1987

Ed Cassity v. J. J. Castagno : Brief of Respondent

Utah Supreme Court

BRIEF

In the Supreme Court of the State of Utah

ED CASSITY,
Plaintiff and Appellant,

vs.

J. J. CASTAGNO,
Defendant and Respondent.

Case No. 8794

BRIEF OF RESPONDENT

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RESPONDENT'S ARGUMENT

RESPONDENT'S SUPPLEMENTAL STATEMENT OF FACTS

1. *Special Interrogatories and Verdict Thereon.*

The clerk of the trial court failed to include in the Record of Appeal, the special interrogatories propounded by the trial court to the jury, and the answers of the jury thereto. However, Appellant in his brief, at pages 4, 5 and 6, has correctly transcribed and set forth said interrogatories and answers. Notwithstanding the fact that the original interrogatories and answers are not included in the Record of Appeal, the Respondent hereby approves of the action of Appellant in including the same in his brief, and does hereby adopt such action in lieu of the inclusion in the Record of Appeal of the original interrogatories and answers.

2. *Plaintiff's Exhibit I.*

Attention is particularly invited to "P Ex I," which is a map upon which is delineated the respective ownerships of land of Appellant and Respondent involved in this action. The holdings of Respondent in this area which are of particular concern are as follows:

(a) The "Exchange property" acquired by Respondent by Patent, dated Dec. 30, 1953, from the United States of America, and delineated upon said exhibit in pink, bearing the numeral '5";

(b) The "Homestead property" acquired by Respondent by Patent, dated February 6, 1939, from the United States of America, and delineated upon said exhibit in pink, bearing the numeral "3."

Upon "P Ex I" is shown a lead pencil line commencing on the North boundary line of Section 23, Township 2 South, Range 5 East, Salt Lake Meridian, and extending in a Northwesterly direction across the "Exchange" property and "Homestead" property of Respondent, and thence continuing in a Northwesterly direction to Stansbury Island. This lead pencil marking represents the so-called "Trailway" claimed by Appellant. It was placed upon "P Ex I" by the Appellant at the trial (R. 67, 68, 69, 70).

3. *Supplemental Evidence*

For convenience, Respondent has included in the argumentative portion of this brief such supplemental evidence as he deems necessary for a proper determination of this case.

Part A
RESPONDENT'S ARGUMENT AND DEMONSTRATION OF VALIDITY OF JUDGMENT

POINT I.

WITH RESPECT TO THE LAND ACQUIRED BY DEFENDANT FROM THE UNITED STATES OF AMERICA BY PATENT DATED DECEMBER 30, 1953, AND RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF TOOELE COUNTY ON FEBRUARY 15, 1954, IN BOOK 4 F OF DEEDS AT PAGE 229, THE PLAINTIFF HAS ACQUIRED NO TRAILWAY EASEMENT OVER SAME IN SPITE OF THE FINDINGS THAT THE PLAINTIFF AND HIS PREDECESSORS IN INTEREST HAD TRAILED CATTLE OVER AND ACROSS THE SAME FOR A PERIOD OF TWENTY YEARS PRIOR TO MAY 3, 1955, AND NEITHER DOES ANY PUBLIC HIGHWAY OR ROAD EXIST OVER DEFENDANT'S SAID LANDS.

1. STATEMENT OF FACTS.

Defendant acquired the fee simple title to land delineated as "Pink 5" on Exhibit 1 by virtue of the Federal patent above described on Dec. 30, 1953 (R. 118). This land is particularly described as:

> W½ SW¼ and SE¼ SW¼, Sec. 4, Lots 6, 7, E½ SW¼, Sec. 6, NW¼, SE¼, W½ NE¼, SE¼ NE¼, Sec. 9, SW¼ SE¼, NW¼ SW¼, Sec. 10; NW¼, NW¼ NE¼, N½ SW¼, SW¼ SW¼, Sec. 15; NW ¼ NW¼ Sec. 15; NW¼ NW¼, Sec. 22.
>
> (All of the foregoing is situate in Twp. 2 South, Range 5 West, Salt Lake Base and Meridian).
>
> SE¼ Sec. 1, Twp. 2 South, Range 6 West, Salt Lake Base and Meridian.

Prior to the date of the patent the lands described therein were public domain owned by the United States of America. The so-called trailway to and from Stansbury

Island passes over and across the land above described located in Twp. 2 South, Range 5 West, Salt Lake Base and Meridian, with a compass direction from approximately the southeast to the northwest. The plaintiff definitely marked this position of this trailway on P Ex. I and there is evidence that the trallway deviated from this course (R. 95).

Plaintiff's evidence was directed towards establishing a private trailway easement. It was intended to support the allegations of plaintiff's supplemental complaint which claimed a private prescriptive easement over defendant's lands as appurtenant to plaintiff's lands. It is alleged:

> "Plaintiff's cattle have during said period of time trailed and crossed back and forth *from the approximately* 5,700 *acres of land which plaintiff owns in said Township* 2 *South, Range* 5 *West,* to his other grazing lands located upon Stansbury Island and said use in crossing, trailing and moving almost continually over and across the lands by plaintiff *and his predecessors in interest has been open, under an adverse claim of right, known and acquiesced in by defendant and his predecessors in interest,* and has created *by prescription an easement over and across all of said lands within the above described area which are not owned by plaintiff, and which easement has become and is now the property right of plaintiff* in and to all said portions of land. That all of said use by plaintiff and his predecessors in interest, *have been an adverse use made with* knowledge at all times of the owner of said lands and without their consent and permission to said use being made." (Underscoring supplied) (Part I of plaintiff's First Cross Claim and Counterclaim)

There is no allegation in the Supplemental Complaint and no evidence in the record which even suggests that plaintiff claimed that a public road existed over defendant's lands prior to the date of patent thereof in 1953. Plaintiff claimed by the allegations of his Supplemental Complaint and his evidence was given to prove a private easement — not the existence of a public road. There was no interrogatory propounded to the jury concerning the existence of a public road or highway. The pertinent interrogatories are:

> "9. Do you find by a preponderance of the evidence that the plaintiff and his predecessors in ownership and possession drove or trailed their cattle across defendant's lands in going to and from Stansbury Island? (Answer yes or no).
> Answer: 'Yes.'
>
> "10. If your answer to No. 9 is yes, answer the following questions:
>
> A. Prior to May 3, 1955, did the plaintiff and his predecessors in ownership and possession regularly use the defendant's lands for that purpose for 20 consecutive years? (Answer yes or no).
> Answer: 'Yes.'
>
> B. Did the trail, if any, follow the same general course and direction during the 20 year period referred to in the next preceding question?
> Answer: 'Yes.'"

The Court followed the theory of plaintiff's supplemental complaint and of plaintiff's evidence in propounding these interrogatories, and submitted to the jury questions which pertained to facts relevant only to the question whether a private prescriptive trailway

easement appurtenant to plaintiff's lands as the dominant tenement, had come into existence. There was no finding as to the existence of a pre-patent public highway or road over defendant's lands and neither did the Court ask for any such finding for two valid reasons: (a) plaintiff's supplemental complaint alleged no facts upon which such claim could be based, and (b) there is no evidence in the record supporting such claim.

2. CITATION OF AUTHORITIES.

A. *Private, prescriptive right in the Public Domain.*

"It is conceded that title to Appellants' land remained in the United States until December, 1891. * * * This court has repeatedly held that a prescriptive right in, to and over real estate can be acquired only after an open, continuous and adverse user for a period of 20 years. * * * It follows therefore that the time at which the respondents alleged prescriptive right commenced was in December 1891. This falls far short of the period of time required to entitle respondent to a right of way over appellants' land by prescription, and he must therefore fail upon this ground." (Lund vs. Wilcox, 34 Utah 205; 97 Pac. 33)

"While there is no evidence in the record showing when the patent was issued by the United States in whom the original title was vested to respondent's land, yet their counsel in their brief, in referring to this subject at page 13, says: 'The Murphys (respondents) land was patented in 1874.' We assume this to be the fact. If, therefore, no title passed from the government of the United States to that of private ownership in the year 1874, the right to acquire a private easement by user or prescription dates from that

year. * * * If, therefore, we begin with the year 1875 the twenty year period would end with the beginning of the year 1895." (Bolton v. Murphy, 41 Utah 591; 127 Pac. 335)

"It may be conceded that plaintiff is supported by the authorities in his contention that an easement by prescription cannot be acquired over land belonging to the State or the United States, (10 C.J. Secs. 23, 24, pg. 876). Such has been declared to be the law of this jurisdiction as applied to land belonging to the United States. (Bolton v. Murphy supra, Lund v. Wilcox supra). The title to a part of plaintiff's land over which the defendants claim the right to convey the water with which to irrigate their land was conveyed by the United States to E. W. Tripp, the predecessor of the plaintiff, in 1899. The title to the other land over which the defendants claim such right was conveyed by the State of Utah in 1913. It will be thus seen that, if there was a break in defendants' use of the irrigating ditches across plaintiffs' land from 1907 to 1917 the defendants could not acquire an easement by prescription across plaintiffs' land because there could not be a continuous use for a period of 20 years. As to the land conveyed to plaintiff by the State of Utah in 1913, obviously a prescriptive easement could not be acquired up to 1922 when this suit was begun." (Tripp v. Bagley, 74 Utah 57, 276 Pac. 912; 69 ALR 1417).

"It is well established as the rule in Utah that the prescriptive period is twenty years as it was at the common law (citing Utah Supreme Court decision.) (Savage v. Nielsen, 114 Utah 22; 197 Pac. (2d) 117 at 122).

B. *Highways Over Public Lands.*

"The right of way for the construction of highways over public lands, not reserved for pub

lic use, is hereby granted." (USRS 2477; 43 USCA Sec. 932).

"Highways are distinguished from private roads or ways in that the former are intended for the use of the public generally and are maintained at public expense, as already noted, while the latter are intended for the exclusive use and benefit of particular persons. Giving a private way a name does not make it a public highway or thoroufare." (25 Am. Jur., Highways, Sec. 4, pg. 340)

"The term 'highway' is, however, used in both a broad and narrow sense. In its broad or general sense, it covers every common way for travel in any ordinary mode or by any ordinary means which the public has the right to use conditionally or unconditionally. * * * In a limited sense, however, the term means a way for general travel which is wholly public. When appearing in a general law, it will ordinarily be regarded as having been used by the legislature in its general sense. * * *" (25 Am. Jur., Highways, Sec. 5, pg. 341)

"If a way is one over which the public have a general right of passage, it is in legal contemplation a highway, whether it be one owned by a private corporation or one owned by the government, or a governmental corporation, and whether it be situated in a town or in the country. No matter whether it be established by prescription or by dedication, or under the rights of eminent domain, *it is a highway if there is a general right to use it for travel. The mode of its creation does not of itself invariably determine its character: for this in general, is determined by the rights which the public have in it.* (Underscoring supplied) (Elliott, Roads and Streets, Vol. 1, Sec. 3, pg. 4).

"In order to constitute a particular road or highway a public road and the traffic and travel thereon subject to regulation and control by the Commission the question is not whether the county or state has acquired an indefeasible title, easement, or right of way, *but the question is whether the particular road or highway is being used by the public generally for travel and traffic and is claimed by the public as a public road or highway, and as such is being used for the purpose of hauling and transporting freight and passengers over it for hire or private gain by those owning and using the ordinary and usual vehicles used on public highways for such purpose. Any road or highway which is thus being used by the public generally* is, in my judgment, a public road or highway within the purview of the law, over which the travel and traffic is subject to regulation by the Commission. (Emphasis supplied.) (Justice Frick in Public Utilities Commission v. Jones, 54 Utah 111, 179 Pac. 745)

"The term 'public highway' in its broad, popular sense includes toll roads, — any road which the public have a right to use even conditionally, though in a strict legal sense, it is restricted to roads which are wholly public." (Weirick vs. State, 140 Wis. 98, 121 NW 652, 22 LRA (N.S.) 1221)

"The word 'highway' as ordinarily used means a way over land open to the use of the general public without unreasonable distinction or discrimination, established in a mode by the laws of the State where located." (Lovelace v. Hightower, 50 N.M. 50; 168 Pac. (2nd) 50).

"The federal statute involved is as follows: 'The right of way for the construction of highways over public lands, not reserved for public uses is hereby granted.' This is an offer to dedi-

cate any unreserved public lands for the construction of highways to become effective * * *. It is a general rule that acceptance of an offered dedication of land for a highway may be established by proof of affirmative acts of taking possession by public authorities or by general use by the public, provided the use is sufficient to constitute acceptance. (Citing authorities). The Supreme Court of the United States has said that such uses 'ought to be for such length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.'" (City of Cincinnati vs. White's Lessee, 6 Pet. 431, 8 L.Ed. 452. * * *.

"The United States as a land owner has made an offer to dedicate unappropriated land for highways, if accepted as authorized by this state's law. The easement for its use as a public highway was created exactly as those (of which) the dedicator was an individual land owner. If mere public user is sufficient acceptance of an offered dedication, the ten year statute of limitations is not remotely applicable. * * * The courts of a majority of the states which have had the question for consideration have held that the general rules applies to the offered dedication of highways under the Federal statute involved here. (Citing authorities) (Lovelace v. Hightower, supra)

"The cause of action upon which plaintiff prevailed herein upon a finding that the road is a public highway was not the same cause of action as the one in the former action which alleged his ownership of a private right of way. *The proof that would have established one cause of action would not have established the other. The causes of action were in fact inconsistent, since defendant could not have sold and plaintiff could not have purchased, a private right of way over a*

public road. Moreover, a different title was involved in each case, the first a private title, and the other a title vested in the public. * * * The question of the public character of the road was not in issue in the first case and the issue was not tried. A decision either way as to the private right claimed would not have determined any question as to the public right." (Emphasis supplied) (Ball v. Stephens, 68 Cal. App. 843, 158 Pac. (2nd) 207).

"The grant (R.S. 2477, 43 U.S. CA 932, supra) is unconditional and contains no provision as to the manner of its acceptance. We think it quite well settled that when land is granted for a right of way for a public highway, the grant may be accepted by the public without action by the public authorities. The continued use of the road *by the public* for such length of time and under such circumstances as to clearly indicate an intention *on the part of the public* to accept the grant has generally been held sufficient more especially so if it is made to appear that to interrupt the use would "inconvenience *the public.*" *It must be born in mind that it is not a question of the establishment of a highway by prescription which is here in question, but the acceptance of a grant;* and therefore it does not depend so much on a definite length of time of use *as upon the character of the use,* taking into account the needs and convenience of *the public,* as manifesting an intention to accept the grant. (Emphasis supplied) (Hatch Bros. Co. v. Black, 25 Wyo. 109, 165 Pac. 518) (Cf: on rehearing, 25 Wyo. 416, 171 Pac. 267)

"A highway is a way open to the public at large, for travel or transportation, without distinction, discrimination or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit

therefrom and enjoyment thereof. *Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way, a public highway, and the actual amount of travel upon it is not material. If it is open to all who desire to use it it is a public highway although it may accomodate only a limited portion of the public or even a single family, and although it accommodates some individuals more than others.*" (Emphasis supplied) (25 Am. Jur. Highways — Sec. 2, Pgs. 339, 340)

Lindsay Land & Livestock Co. v. Churnes, 75 Utah 384, 285 Pac. 646

Sullivan v. Condas, 76 Utah 585, 290 Pac. 954

Jeremy v. Bertagnole, 101 Utah 1, 116 Pac. (2nd) 420

O.S.L. Rd. Co. vs. Murray City, 2 Utah (2nd) 427, 277 Pac. (2nd) 798

Leach v. Manhart, 102 Colo. 129, 77 Pac. (2nd) 652

"Use under private right is not sufficient. If the thoroughfare is laid out or used as a private way, its use, however long as a private way does not make it a public way. Use under private use is not sufficient * * * and the mere fact that the public make use of it without objection from the owner of the land will not make it a public way. Before it becomes public in character the owner of the land must consent to the change. (Morris v. Blunt, 49 Utah 243, 161 Pac. 1127)

3. ARGUMENT

A. *Private Prescriptive Rights on Public Domain*

The uncontroverted facts in this case absolutely deny plaintiff any private trailway easement over, upon

or across lands of defendant above described. Any use of these lands by plaintiff and predecessors in title while the lands were part of the public domain cannot, of course, be considered in determining the existence of a private prescriptive right. (See authorities cited above.) Plaintiff commenced the present action on May 28, 1955, by filing his complaint in the office of the Clerk of the Court. He served and filed his answer to defendant's cross complaint and his supplemental complaint setting up his alleged private prescriptive right to a trailway easement over said lands on January 6, 1956. The Federal patent is dated Dec. 30, 1953, and was recorded Feb. 15, 1954 (R. 118). If plaintiff is allowed the benefit of the January 6, 1956 date (date of filing his supplemental complaint) instead of May 28, 1955 (date of filing his original complaint), the expired time after issuance of Federal patent during which plaintiff used defendant's said lands is not more than 1 year, 10 months and 21 days (time between date of recording patent—Feb. 15, 1954—and date of filing supplemental complaint—January 6, 1956). If the period is computed from date of Federal patent (Dec. 30, 1953) to date of filing supplemental complaint (January 6, 1956), the result is 2 years and 6 days. In either of said methods it is clearly obvious that plaintiff has failed in his proof of a prescriptive user of 20 years or more. The facts and the law, as enunciated by the cited authorities, require judgment in defendant's favor on this facet and theory of the case.

B. *Highways Over Public Lands*

Plaintiff's cause of action as set forth in his Supplemental Complaint alleged facts upon which a claim for a

private prescriptive way could be based. It is self evident from the allegations set forth above that the pleader's theory was that plaintiff had acquired by over twenty years continuous adverse user a private prescriptive trail way over defendant's lands appurtenant to plaintiff's land located in the area. This claim is defeated by the law and facts of the case as above demonstrated. An examination of plaintiff's evidence shows it was given in support of these allegations and of plaintiff's theory of this case. There is not a suggestion or implication in plaintiff's evidence that the general public was interested or had ever used the alleged trailway. *He claimed and his evidence was directed to prove that he and his predecessors in interest claimed a private right over defendant's lands.* The defendant met this evidence by counter-posing evidence and the Court based his interrogatories on plaintiff's theory (Interrogatories 9 and 10). This aspect of the case was tried on the issue whether a private prescriptive easement existed over defendant's lands, and not on any other theory.

The authorities above cited definitely differentiate between (a) a private easement acquired by prescription, and (b) a user by the public of sufficient substance as to indicate an acceptance by the public of the offer by the United States under R.S. 2477 (43 U.S.C.A., Sec. 932). It is appropriate to repeat here the admonition of the Wyoming Supreme Court in *Hatch Bros. Co. v. Black,* supra:

> "It must be borne in mind that it is not a question of the establishment of a highway by prescription which is here in question, but the acceptance of a grant ***"

It will be a vain search of the trial record to attempt to discover even a scintilla in evidence which will support a finding that prior to patent issuance to defendant a public highway existed over defendant's land. Such evidence is simply not in the record. Evidence supporting a claim for a private prescriptive easement will not prove the existence of a public highway. Each claim is separate from the other and in fact antagonistic. The Court of Civil Appeals of California pointed up the distinction in *Ball v. Stephens* supra, and the excerpt quoted from that decision is not only pertinent to the situation in this case, but decisively answers any argument which plaintiff might present to support a claim that defendant took title to his lands under the 1953 patent burdened by public highway or road. Plaintiff in his supplemental complaint never claimed that there existed a "pre-patent" highway under R.S. 2477. His entire effort in his pleading and at the trial was to claim and prove a *private trailway easement.*

Any argument in support of the "public highway" theory in this case fails to find support both in the evidence and in the law. If this action be treated as a law action, then there is no finding by the jury as to the existence of a pre-patent public highway. The failure of the court to submit an interrogatory on this question is no fault of the court. It would have been error on its part to have done so inasmuch as plaintiff's pleadings and his evidence are based alone on the private prescriptive right theory. Neither did plaintiff request the Court to propound an interrogatory on the question of the existence of a pre-patent public highway. His perti-

nent requested interrogatories do not contain the words "public highway." They pertain only to private prescriptive rights. The "public highway" theory was not advanced at trial even by way of argument and certainly not by the pleadings or evidence. If this action be treated as one in equity the "public highway" theory fails because there is no evidence to support the finding of the pre-patent public user under R.S. 2477. The Court would commit gross error in making such a finding. Plaintiff, by means of his pleadings and evidence, lulled both the defendant and the Court into the belief that he was relying only on the private prescriptive right theory. The pre-patent "public highway" theory and argument comes too late to be available to plaintiff. Beyond all peradventures defendant is entitled to judgment in his favor on this facet of the case.

POINT II

PLAINTIFF HAS ACQUIRED NO PRIVATE PRESCRIPTIVE TRAILWAY EASEMENT OVER DEFENDANT'S "HOMESTEAD PROPERTY," BEING THE LAND CONVEYED TO DEFENDANT BY THE UNITED STATES OF AMERICA BY PATENT DATED FEB. 6, 1939, AND RECORDED ON AUGUST 7, 1939, IN BOOK 3 Y AT PAGES 377, 378, AND NEITHER DID THERE EXIST A PUBLIC HIGHWAY OVER DEFENDANT'S SAID LAND PRIOR TO PATENT.

1. STATEMENT OF FACTS.

Defendant acquired the fee simple title to land delineated as "Pink 2" on Exhibit P Ex. I by virtue of Federal patent dated February 6, 1939, and recorded on August 7, 1939 (R. 170). The land is particularly described as:

NW¼ SE¼ and SW¼ NE¼ of Sec. 15, Twp. 2 South, Range 5 East, Salt Lake Base and Meridian.

This land also was part of the public domain owned by the United States of America prior to the date of the patent. It was acquired by defendant under the Federal Homestead Law, and is for convenience designated herein as ("Homestead" lands). Plaintiff has pleaded a private trailway easement over this "homestead" land (See Par. I, pg. 2 of his Supplemental Complaint) and attempted proof of facts in the endeavor to establish such private prescriptive trailway easement. This alleged private trailway easement represents the southeastern portion of the same trailway claimed b yplaintiff over the lands of defendant particularly described in Point I of this brief. The alleged trailway over the "homestead" lands is the initial portion of the alleged "Stansbury Island" trailway (P Ex. I). Plaintiff's pleading and evidence were solely directed toward claiming and proving a private trailway easement over the "homestead" lands. There is not a scintilla of evidence in the record with respect to the existence of a pre-patent "public highway." Plaintiff requested no interrogatory on the question of the existence of a pre-patent public highway and the Court propounded none. Plaintiff's relevant pleading on this issue is quoted verbatim in Point I of this brief. There is no finding by the jury as to the existence of a pre-patent "public highway" over and across the "homestead" lands.

2. CITATION OF AUTHORITIES.

See authorities cited in Point I, 2, supra of this brief.

3. ARGUMENT.

Again plaintiff fails in establishing a private prescriptive easement over and across defendant's lands last above described. The homestead patent in defendant's favor was dated February 6, 1939, and was recorded August 7, 1939 (R. 170). Plaintiff filed his Supplemental Complaint alleging his right to a trailway easement over said land on January 6, 1956. The expired time is therefore 16 years, 4 months and 29 days. If the date of the patent is taken as the starting point (Feb. 6, 1939) to date of filing Supplemental Complaint Jan. 6, 1956, the expired time is 16 years, and 11 months. Obviously neither of said computations yields a period of prescriptive user short of the required 20 years. The period of use of the defendant's lands by plaintiff and predecessors when title to same was in the United States cannot be and is not counted in determining the time of adverse user. (See authorities cited in Point I supra). In the first instance it is 3 years, 7 months and 1 day short. In the second instance it is 3 years and 1 month deficient. Under the law and the facts defendant is entitled to judgment of Court quieting his title as to said land against plaintiff's pretended claim of a private prescriptive right over defendant's "homestead" lands.

The pre-patent "public highway" theory is as equally inapplicable to defendant's "homestead" lands as it is to the lands of defendant described in Point I of this brief. The legal authorities and argument hereinbefore submitted against the adoption of said theory are restated and reaffirmed as to defendant's "homestead" lands. Manifestly defendant is entitled to judgment in this

action denying the existence of a pre-patent "pubic highway" over his "homestead" lands.

POINT III

PLAINTIFF HAS NEVER ACQUIRED THE RIGHT TO USE THE WATER, WHICH DURING CERTAIN SEASONS OF THE YEAR ACCUMULATES ON DEFENDANT'S LAND SITUATE IN SECS. 9 AND 22, TWP 2 SOUTH, RANGE 5 WEST, SALT LAKE BASE AND MERIDIAN.

1. STATEMENT OF FACTS.

The pertinent findings by the jury relative to this phase of the case are found in response to the prepounding of the following interrogatories:

> "11—Do you find by a preponderance of the evidence that the plaintiff and his predecessors in ownership used the lands of the defendant in Sections 9 and 22, Twp. 2 South, Range 5 West and the water holes, if any, upon said lands to water his cattle for a period of 20 consecutive years prior to May 31, 1955: Answer: Yes.
>
> "12—If your answer to No. 11 is yes, answer the following question:
>
> "For how many consecutive years prior to May 31, 1955, has the plaintiff and his predecessors in ownership used said lands and water holes? Answer: 50 years."

There are no jury findings as to the origin of the water nor its quantity, nor the nature and size of the deposit of water nor whether it was and is produced as a result of man or as a natural accumulation, nor as to the frequency or infrequency of its accumulation on the said lands. The interrogations assumed the existence of water on said lands in "water holes." It is therefore necessary to consider the evidence introduced at the trial. There is a high degree of conflict in the evidence. The evidence of

the defendant denies the presence of water, and the existence of "water holes" (R. 18, 22). At the most, these are low places which are "bogs" or mud holes during most seasons of the year (R. 23). According to defendant, the "bog" or mud hole in Sec. 9 was "dynamited" in 1938 or 1939 and since that time there has been no sign of water (R. 191). Defendant has never seen plaintiff's cattle drink at any "hole" on said section, but rather they went to adjacent flowing wells to drink (R. 19, 23). There were and are no live streams or springs on said sections. Examination of said lands was made in 1945 by witnesses in connection with defendant's "exchange" transaction with the United States. These witnesses testified in substance that there were no "water holes" as the term is ordinarily used nor were there live streams or springs on the land. On one of the sections there was a low place or "bog" but it contained little if any water.

Plaintiff testified "water holes" existed in said sections and cattle drank from same (R. 64, 65, 88). The water stands in the holes and does not flow out on the lands (R. 84). There are four small holes on Sec. 9 (R. 83). They hold water the year long—water fit for cattle to drink (R. 85). Cattle have used them for years during all months of the year. The so called "water holes" are in truth but cow tracks which during certain seasons of the year fill with water (R. 86, 88). Water does not flow off in a channel (R. 87). Pierre Castagno testified in the summer of 1952 there was water in the "hole" on Sec. 9 sufficient to water 30 or 40 horses and that in the spring of the year there is sufficient water in the "holes" to water 20 or 30 head of cattle (R. 255). Tony Castagno

testified there are "water holes" on said sections, which contain water during all times of the year and in amount sufficient to water cattle. They are never completely dried up (R. 295). Rose Castagno stated there are three water holes on land "north of the old homestead" (R. 304). None of them ever died up and they contained water at all times of drinkable quality (R. 304). Keith Wanless testified there are water holes on said sections and water is of such quantity and quality as to be drinkable (R. 308, 310). Water was in the "holes" in 1956 sufficient to water cattle (R. 310, 311). Twenty-five cows could water at those "holes" (R. 317).

Included in the presentation of the Argument, hereinafter contained, reference is made to other testimony in the case.

2. CONSTITUTIONAL AND STATUTORY ENACTMENTS.

(1) *If the water, which during certain seasons of the year accumulates on defendant's lands in Section 9 and 22, Twp. 2 South, Range 5 West, Salt Lake B. and M. is in the nature of either (a) waste or seepage water, or (b) surface water, or (c) percolating water, at no time has it been nor is it now subject to appropriation and neither could any rights thereto be acquired by prescription.* (56 Am. Jur.—Waters—Sec. 66, Pgs. 548, 549).

A. *Waste Water*

> "*** The owner of a water right, after diversion from the stream is the owner and entitled to the water itself, the corpus of the water as long as he retains it in his ditches and reservoirs on his property and under his control *** As long as the water is under the control of the appropriator in

his land or in his ditches or reservoirs or other things owned and controlled by him, it is still his water and he may use it in any lawful place or for any lawful use he chooses, or may lease and sell it. ***" (*Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co.,* 105 Utah 468, 142 Pac. (2nd) 866, 871; also 113 Utah 356, 195 Pac. (2nd) 249.)

"However in the absence of such a statute it is generally held that such waste of water and seepage cannot be appropriated * * * The plaintiff apparently bases its claim to the exclusive right to the use of this waste water whenever it is available upon the fact that it has been using such waste water for a long period of time without interruption. However, I do not believe that an exclusive right to the use of the waste water can be acquired in this manner." (Justice Wolfe in *Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co.,* supra, and particularly at pg. 871 of 149 Pac. (2nd).

See also: *Lasson v. Seeley,* 120 Utah 679, 238 Pac. (2nd) 418.

"The question for decision is whether the plaintiff has made a valid appropriation of waste water as against the defendants, or whether the defendants have a right, as against plaintiff, to intercept upon their own land, and before it passes therefrom, water which has been spread upon the same, but not entirely consumed, in the process of irrigation. It will be observed from the foregoing statement that it is only to such water as has actually escaped from defendants, and reached her own lands that plaintiff makes claim. *** It is manifest that, as against the defendants, the plaintiff has not made a valid appropriation of this alleged waste water. Just what constitutes waste water in every instance we do not decide, but it is unquestionably true,

so far as concerns the right to make a valid appropriation of it, this water is not waste water so long as it remains upon the lands of the defendants, and does not, in any event, become such until it has escaped and reached the lands of others. The plaintiff certainly has acquired no vested right to compel the defendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into their own ground, but escape and pass from the surface onto her lands. *** So long as, and while, the water which is applied by defendants to the irrigation of their lands remains upon the same, it is, as against the plaintiff, their exclusive property, whatever may be the rights of plaintiff as against some other claimant to it as waste water." (*Burkart v. Meiberg,* 37 Colo. 187, 86 Pac. 98, 6 LRA (NS) 1104.)

"Defendant's case, both by pleading and evidence, is that these waters did not constitute springs or natural water courses, but percolated through, and by artificial means had been collected into bodies or artificial springs on defendant Baker's own land, which by artificial surface channels flowed into plaintiff's canal, and was, with his consent, used by plaintiff only when he did not choose to use the same for his own lawful purposes, which he often did. *** The trial court found, in accordance with the defendants' claim, that these waters originally existed as percolating waters in defendant Baker's land, and by artificial means were developed and collected by him into artificial basins in the semblance of springs, and as such, therefore, belonged to him, as an integral part of his own land, which ownership has never been divested. * * * The law, under the facts, makes these waters, arising, as they do, on defendant Baker's lands, whether they be artificially collected percolating waters or the

waters of a natural flowing stream or spring, his property, as against the plaintiff in this case, unless the latter has acquired them in some way known to the law. *** And it is of no consequence here whether they are natural springs arising on the defendant's lands or have been intercepted as percolating waters and artificially collected.

"The doctrine of appropriation, as understood in the arid states, may or may not, under the facts of the case, apply to these waters. That we need not decide, for it is clear that, according to the findings, the plaintiff has not made a valid appropriation. *** It is also equally clear that no right by prescription or adverse use has been established, for the findings were that whenever defendant Baker wished to use these waters for his own domestic purposes, for irrigating lands, or for filling fish ponds, or for sale as merchandise, or otherwise, he did so under claim of ownership." (*Smith Canal and Ditch Co. v. Colorado Ice & Storage Co.,* 34 Colo. 485, 82 Pac. 940, 3 LRA (N.S.) 1148.)

"It is probably safer, for the benefit of all, and for the sake of stability of water rights, to declare definitely that an appropriation of seepage water is void. Of course, if a party has once obtained possession of such water, and another party not entitled thereto should attempt to deprive him thereof, the possessor would doubtless have a cause of action. Wiel, supra, Sec. 55. But that is not the situation here. The intervener wanted to get possession, and sues because Binning prevented him from getting it." (*Binning v. Miller,* 88. Wyo. 451; 102 Pac. (2nd) 54, at pg. 62).

"Likewise, in Kinney on Irrigation, 2nd Ed., volume 2, page 1151, Section 661, is the following:

'Authorities hold that while the water, so denominated as waste water, may be used

after it escapes, no permanent right can be acquired to have the discharge kept up, either by appropriation, or a right by prescription, estoppel, or acquiescence in its use while it is escaping, and that, too, even though expensive ditches or works were constructed for the purpose of utilizing such waste water, unless some other element enters into the condition of affairs, other than the mere use of the water. In other words, the original appropriators have the right, and in fact it is their duty to prevent, as far as possible, all waste of the water which they have appropriated, in order that the others who are entitled thereto may receive the benefit thereof.'

Also, section 662, at page 1153:

'After water has been appropriated and diverted from a natural stream into ditches, canals, or other artificial works, it becomes personal property and cannot be appropriated from such works.'

"There is no obligation upon an owner to continue to maintain conditions so as to supply water to appropriators of waste water at any time or in any quantity when acting in good faith." (*Tongue Creek Orchard Co. v. Town of Orchard City,* 131 Colo. 177, 280 Pac. (2nd) 426, 428.)

"Neither the rule of reasonable use nor the rule of correlative rights has any application to percolating water which is the result of the landowner irrigating his land. The rules are limited in their application to such water as percolates through the soil from natural causes. If a landowner conveys water onto his premises by artificial irrigation and thereby causes water to percolate through his land and into adjoining land, the owner of the adjoining land does not acquire a vested right to have the water continue to so percolate through his land. A landowner may

irrigate or fail to irrigate his land, and, although by irrigation a benefit is conferred upon an adjoining landowner, such benefit may be withheld at pleasure. Percolating water resulting from the irrigation of one's own land may be recovered and used by the owner before it leaves his land without invading any right of an adjoining landowner." (*Petersen v. Cache County Drainage District,* 77 Utah 256, 294 Pac. 289, 291.)

"It is sufficient to here state, without approving or disapproving the doctrine of the reasonable use rule, that the facts as found by the court do not bring the case within that rule. The seepage or percolating water here involved is created by the artificial irrigation of appellant's land. True, as a result of this irrigation, the water sinks, seeps, and percolates into the soil of appellant's land and saturates it for a depth of several feet; it, nevertheless, is nothing more in fact and in law than surface or waste water. *** The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow. The general rule regarding the right of the owner of land to surface water therein is stated by Mr. Farnham, in his work on Water Rights (page 2572), as follows: 'There is no right on the part of a lower appropriator to have surface water flow to his land from upper property. The owner of the soil on which it falls has an absolute right to it, and may do with it what he pleases. And the fact that surface water has flowed from the land of one man onto that of another for more than 20 years will not prevent the former from draining his land so as to cut off the flow.'

"In 1 Wiel on Water Rights (3d Ed.) p. 50, the author says: 'While artificial flow claimants may thus have priorities between themselves, they can have no right of continuance against the owner of the natural supply (the appropriator on the natural stream ***), except by grant, condemnation, or dedication (or by rule of compulsory service where the water is distributed to public use). The chief instance of artificial flows in practice is where some stream owner has carried water to a distance and, after use, discharges it below his land or works. *** Seeing the water come down, other parties arrive, build ditches below, receive the water, and put it to use. Yet unless they have a contract with the stream owner, they must generally rely upon continued receipt from him of such water at their peril. In such case the creator of this artificial flow may cease to allow it to escape.' And on page 52 it is said: "In the absence of contract, the natural water-right owner may cease the abandonment of waste from a ditch, and so use the water that none of it thereafter runs waste, or so that it runs off in a new place where people below no longer can get it. Long receipt by them of the water of itself gives no permanent right to have the discharge continued, whether by appropriation, prescription, or estoppel, even though the lower claimants built expensive ditches or flumes to catch the waste.' Numerous decisions are cited by the author in a note to the text which illustrate and support this doctrine. And again on page 54 it is said: 'Waste water soaking from the land of another after irrigation need not be continued, and may be intercepted and taken by such original irrigator, and conducted elsewhere, though parties theretofore using the waste are deprived thereof.' (*Garn v. Rollins,* 41 Utah 260, 125 Pac. 867, 871, 872.)

"It is a rule long recognized that a landowner cannot acquire a prescriptive right to the con-

tinued flow of waste or seepage water from the land of another, that is, seepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant.

> 'No valid appropriation can be made or prescriptive right acquired by gathering surplus water as it flows over the surface from adjoining property upon which it has been spread for irrigation purposes, or by merely accepting and using water when it is allowed to flow into one's ditch by the original owner, who makes exclusive use of it whenever he chooses to do so.' 30 Am. Jur. 611, Sec. 19.

"The original appropriator may at any time recapture waste water remaining on his land and apply it to a beneficial use. Barker v. Sonner, 135 Or. 75, 294 P. 1053; Sebern v. Moore, 44 Idaho 410, 258 P. 176; Reynolds Irrigation Co. v. Sproat, 70 Idaho 217, 214 P. 2d 880.

"Hence, as against the original appropriator and owner, an adjoining land owner cannot acquire a prescriptive right to waste or seepage water." (*Thompson v. Bingham,* 78 Idaho 305, 302 Pac. (2nd) 948, 949.

"We think the evidence both for appellants and respondent tends to show that the waters in dispute are seepage and percolating waters. These waters rose in such quantities on respondent's land that it became submerged and was rendered unfit for the raising of hay and other farm products. The respondent undoubtedly had a right to drain his land of the water and put it in a condition for raising crops. Whether he did this by sinking wells or by digging drain ditches was of no concern to appellants. The water thus de-

veloped or collected being waste water which seeps and percolates into respondent's land from adjoining lands, he had the legal right to make whatever beneficial use of it he deemed proper, and he did not invade any right of appellant's by so doing. We think the right to the use of the water in this case comes squarely within the rule announced in the case of Garns v. Rollins, 125 Pac. 867, recently decided by this court." (*Roberts v. Gribble,* 43 Utah 411, 134 Pac. 1014, 1016.)

B. *Surface Water*

"The term 'surface water' is used in the law of waters in reference to a distinct form or class of water which is generally defined as that which is derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground while it remains in such diffused state or condition. It is thus distinguished from water flowing in a natural water course or collected into and forming a definite and identifiable body, such as a lake or pond. In some instances the courts have classed as surface waters such as lie or spread over the surface, or percolate the soil, as in swamps and do not flow in any particular direction." (56 Am. Jur. — Waters—Sec. 65, pgs 547, 548.)

"(Surface) waters, in a legal sense are those which fall on the land, by precipitation from the skies, or arise in springs and spread over the surface of the ground without being collected into a definite body. McDaniel v. Cummings, 83 Cal. 515; 8 L.R.A. 575, 23 Pac. 795; 3 Farnham Waters, Sec. 278." (*San Gabriel Valley Country Club v. Los Angeles County,* 182 Cal. 392, 188 Pac. 554, 9 A.L.R. 1200.)

"Surface waters are those which are produced by rain fall, melting snow, or springs, and which in cases of the two first mentioned sources are

precipitated, and in the case of the last mentioned source rise upon the land *** Such waters are not divested of their character as surface waters by reason of their flowing from the land on which they first make their appearance on to lower land in obedience to the law of gravity." (*Le Brun v. Richards,* 210 Cal. 308, 291 Pac. 825, 72 A.L.R. 336.)

"The term 'surface water' includes such as is carried off by surface drainage—this is drainage independently of a water course." (*Snyder v. Platt Valley, etc. Irrig. Co.,* 144 Neb. 308, 12 N.W. (2d) 160, 160 A.L.R. 1164.)

"*** the weight of authority is to the effect that the right to flow of surface water from an adjoining tract cannot be acquired by prescription." (56 Am. Jur. Waters, Sec. 66, pg. 549.)

"From the facts here it is clear that we are not concerned with the rules which pertain to surface waters in the commonly accepted meaning of that term in adjudications of this type. That term as so used means water diffused over the surface of the ground and derived generally from falling rains or melting snow, and it continues to be such until it reaches well defined channels wherein it customarily flows at which time it becomes part of a stream. Once part of a stream, it does not again become surface water simply because it overflows the banks. Water which continues to flow in the same direction even though outside the banks, and which returns to the channel upon the subsidence of the flood is part of a running stream and it loses its character as such only when it spreads out over the open country, settles in lakes or pools, or finds some other outlet." (*McKell v. Spanish Fork,* 6 Utah (2nd) 92, 305 Pac. (2nd) 1097.)

C. *Percolating Waters*

"The waters issuing from the artificial tunnel

into the lake are found to be underground, percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks, and course. Under such a state of facts, the law seems to be well settled that water percolating through the soil is not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks. When water percolates through and under the surface of the earth upon land belonging to one person, and comes to the surface just before it empties itself upon the land of another, the owner of such land has no right to demand that such percolation shall continue. ***.

"It is clear that, prior to the time when the tunnel was dug upon the mining claim of the defendant, the water was percolating water, flowing, seeping, or circulating in minute particles beneath the surface thereof, without banks or defined channels, and that its course was invisible and unknown. By the construction of this tunnel, this percolating water has become an artificial stream, and has never been diverted from the defendant's land, nor its waters taken away from the defendant or its grantors. Under such circumstances, when percolating waters have been gathered into tunnels or ditches, and allowed to flow from the proprietor's land to the inferior proprietor, and have been used by him a greater period of time than that allowed by the statute of limitations, it has been held that no title by prescription has been gained." (*Crescent Min. Co. v. Silver King Mining Co.*, 17 Utah 444, 54 Pac. 244, 245, 247.)

"When the United States issued it patent to the respondent, neither the bog nor marsh, nor the water in question, was visible upon the land conveyed. Nor was there any known and defined subterranean stream thereon. At that time the water, if it existed at all, was percolating through the soil, or flowing in a subterranean stream, having no defined or known channels, courses, or banks. Water so percolating and flowing forms a part of the realty, and belongs to the owner of the soil. A conveyance or grant by the United States of any part of the public domain to a person, natural or artificial, carries with it the right of filtrating or percolating water, and to streams flowing through the soil beneath the surface, but in undefined and unknown channels, just the same as it carries with it the right to rocks and minerals in the ground which have not been reserved in the instrument of conveyance or by statute. Water, intermingling with the ground or flowing through it by filtration or percolation or by chemical attraction, is but a component part of the earth, and has no characteristics of ownership distinct from the land itself. In the eye of the law, water so commingled and flowing, or motionless, underneath the surface, is not the subject of ownership apart and distinct from the soil. If, however, subsurface streams of water flow in clearly-defined channels, it is otherwise, for then the rules of law applicable to surface streams and waters apply." (*Willow Creek Irrigation Co. v. Michaelson,* 21 Utah 248, 60 Pac. 943.)

(2) *At all times since May* 11, 1903, *the only method by which plaintiff could have acquired the right to use the waters which accumulates on defendant's lands in Sections* 9 *and* 22, *Twp.* 2 *South, Range* 5 *West, Salt Lake Base and Meridian, was by formal appropriation of same as prescribed by the statutes of the State of Utah.*

The acquisition of rights to use water in Utah by prescription has been prohibited since said date.

A. *Constitutional and Statutory Enactments*

"All existing rights to the use of any waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed." (Constitution of State of Utah, ART. XVII, Sec. 1.)

"All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof." (Laws of Utah 1919, Chap. 67, Sec. 1; R.S. 1933, Sec. 100-1-1; Laws of Utah 1935, Chap. 105, Sec. 1; Utah Code Ann. 1943, Sec. 100-1-1; Utah Code Ann. 1953, Sec. 73-1-1.)

The Fifth Regular Session of the Legislature of the State of Utah, convened in February and March, 1903, adopted a Water Code which repealed all prior laws on the subject of Water Rights and Irrigation. (Laws of Utah, 1903, Chap. 100, pg. 88). Section 34 of this enactment reads as follows:

"*Rights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time should be first in right.*" (Italics supplied.)

This new Water Code was approved by the Governor on March 12, 1903, and became effective sixty days after March 12, 1903 (date of *sine die* adjournment of the Legislature), or on May 11, 1903.

The Sixth Regular Session of the Legislature of the State of Utah convened in February and March, 1905, repealed Chapter 100 of the Laws of Utah 1903 (Laws of

Utah 1905, Chap. 108, pg 145), and enacted another Water Code. However, the 1905 Code *continued,* Sec. 34 of the 1903 Code, in exact form as above set forth. (It continued to bear the number of Section 34.) The 1905 Code specifically provided, according to Constitutional mandate, that it should become effective on approval. The Governor approved the Code March 9, 1905, and said date was therefore the effective date of the 1905 Code.

When Compiled Laws of Utah 1907 were prepared, the Water Code of 1905 became Chapter 2 of Title 40 of said Compiled Laws and Sec. 34 of the Water Code of 1903 and 1905 were perpetuated in exact form and phraseology as first above quoted as Sec. 1288X5 Compiled Laws of Utah 1907.

The Ninth Regular Session of the Legislature of the State of Utah, convened January-February and March, 1911, amended Sec. 1288X5 (Compiled Laws of Utah 1907, Chap. 103, Laws of Utah 1911, pg. 143) to read as follows:

> "*Rights to the use of the unappropriated water in the State may be acquired by appropriation in the manner hereinafter provided, and not otherwise.* The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; (*provided that, when a use designated in an application to appropriate any of the unappropriated waters of the State would materially interfere with a more beneficial use of such water, then the appropriation shall be dealt with as provided in Section* 1288X18). (Italics supplied.)

The Governor approved this Act on March 20, 1911. The Legislative session adjourned March 9, 1911. The

Act, therefore became effective May 10, 1911.

When Compiled Laws of 1917 were prepared, Sec. 1288X5, Compiled Laws of Utah, 1907, as amended by Chapter 103, Laws of Utah, 1911, last above quoted, became Sec. 3450, Comp. Laws of Utah 1917, and was a part of Title 55, Chap. 3.

The Thirteenth Regular Session of the Legislature of Utah, convened January, February and March 1919, by Chapter 67, Laws of Utah 1919 (pg. 177) repealed the Water Code as it appeared in Title 55, Chapters 1, 2and 3, Compiled Laws of Utah 1917, and enacted an entirely new Water Code. However, Sec. 41 of this enactment repeated verbatim Sec. 3450, Compiled Laws of Utah 1917. Chapter 67, Laws of Utah 1919, was approved March 13, 1919, and since it carried an emergency clause it became effective on said date.

Title 100, Chap. 3, Revised Statutes of Utah 1933, set forth verbatim Sec. 41, Laws of Utah 1919 (which in its amended form was Sec. 3450, Comp. Laws of Utah 1917). In the R.S. of Utah 1933 the pertinent section was designated Sec. 100-3-1 of the R.S.

The twenty-first Regular Session of the Legislature of Utah, convened January, February and March 1935, amended Sec. 100-3-1, R.S. of Utah 1933, to read as follows:

> "Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. *No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate* shall be recognized except application for such appropriation first be made to the State Engineer

in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose and as between appropriators, the one first in time shall be first in right; provided that when a use designated by an application to appropriate any of the unappropriated waters of the State would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in Section 100-3-8." (Italics supplied.) (Laws of Utah, 1935, Chap. 105, pg. 195-196.)

The Twenty-third Regular Session of the Legislature of Utah, convened January, February and March 1939, amended Sec. 100-3-1, R.S. of Utah 1933, as amended by Chap. 105, Laws of Utah 1935, Chap. 105, quoted in full above, by repeating same in exact language as above set forth and then adding:

> "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."

This amended statute of 1939 carried an emergency clause and thereby became effective on approval, which was March 20, 1939.

Utah Code Ann. 1943, repeats the 1939 reenactment and amendment in exact form as above given, as Sec. 100-3-1. Likewise Utah Code Ann. 1953 repeats the 1939 enactment and amendment as Sec. 73-3-1, and brings the provision to date.

B. *Judicial Decisions*

> "The question is therefore clearly presented whether the actual diversion of water prior to making an application to the state engineer gives to the party making the diversion a right superior

to another who first files his application in the state engineer's office.

"Chapter 67. Laws of Utah 1919, relates to water and water rights. The act is designated as 'An act defining general provisions concerning water and water rights, the appropriation, administration,' etc., and amends some prior laws. Section 41 of that chapter, so far as material here, provides:

> 'Rights to the use of the unappropriated public water in the state may be acquired by appropriation, in the manner hereinafter provided, and not otherwise."

"The section further provides that the appropriation must be for a beneficial purpose, and that as between two appropriators the one first in time shall be first in right. *** The first Utah legislative act, so far as I have been able to ascertain, respecting the method or mode of appropriating water, was passed by the Legislature of 1897 (Laws 1897, c. 52). *** By the act of 1897 any person desiring thereafter to appropriate water was required to post notices in writing in two conspicuous places, one at the post office nearest the point of intended diversion, and the other at the point of intended diversion. *** Apparently no other or further legislation was enacted respecting the appropriation of water until 1903. (Laws 1903 c. 100). The Legislature in that year incorporated in the act relating to water rights and irrigation section 41 as the same appears in chapter 67. Laws Utah 1919. Numerous amendments were made to the irrigation laws of this state by the Legislatures meeting since 1903, but in none of such legislation has the method or manner of appropriating water as prescribed by the Legislature of 1903 been changed or modified. *** If our statute did not contain the words 'and not otherwise,' then the decisions of the appellate

courts of Idaho and Wyoming ought to and would have much weight in a determination of the question now under consideration. It is a matter of common knowledge in this state that many controversies arose between claimants and much litigation resulted prior to our legislative act of 1903 respecting the dates of the appropriation by different claimants of the waters of the state. Very much of that litigation had to do exclusively with the dates of the appropriations. The rule or principle of law that he who was first in time was first in right had become permanently established in the jurisprudence of the state. The fact as to who was a prior appropriator was in much, if not all, of the litigation a controverted question, and one which in many cases was most difficult to determine by reason of there being no public record of just when such appropriations were made. It is therefore not only reasonable and fair to conclude, but affords a strong argument to support the claim, that the language found in the act of 1903 was intended to mean and does mean that the only method to be recognized thereafter was the method therein prescribed. *** We are of the opinion, and so hold, that the Legislature of Utah, by the act of 1903, intended to limit the method of acquiring any rights to the unappropriated public waters of the state to the method or means prescribed in that act. The rights attempted to be acquired by respondent Hooppiania by actually diverting the water and applying the same to a beneficial use must therefore be held to be subject to the right of appellant who will acquire the first right by completing its appropriation initiated by its application filed in the state engineer's office on April 25, 1918." (*Deseret Live Stock Co. v. Hooppiana,* 66 Utah 25, 239 Pac. 479, 482, 483.)

"I concur in the opinion of Mr. Chief Justice Gideon that Chopter 67, Sess. Laws of Utah 1919,

provides an exclusive method for the appropriation of public water in the state of Utah. The very language and purpose of the act, when construed in connection with the acts which it superseded and repealed, demonstrates conclusively that the purpose was to provide an exclusive method of appropriating water and securing a record title thereto. * * * The method presented for appropriating water commences with chapter 100, Sess. Laws 1903, § 34, which section furnishes the key for interpreting all that follows down to and including section 46. Section 34 reads as follows:

> 'Rights to the use of any of the unappropriated water in the state may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right.'

* * * The history of the legislation upon this subject, as above set forth, discloses the fact that the statute involving the question now before the court has been under review at eight different sessions of the Utah Legislature. The law, as originally enacted in 1903, has been amended and changed in divers respects, immaterial as far as the question here is concerned, but the manifestly exclusive features of the method of procedure to procure title have never been changed. * * * If plain, emphatic, unequivocal language is not sufficient to express the intention of the Legislature, in what manner and by what means can the Legislature express its intention? If there were a single line, word, or thought anywhere in the act inconsistent or in conflict with the express declaration of the Legislature at the very starting point of the method of procedure mapped out by the Legislature, I would concur in the suggestion that we should resort to rules

of construction in order to determine the intention of the statute; but the truth is the statute is so plain from he beginning to the end of the whole course of procedure that there is no occasion for resorting to rules of construction. * * * Before concluding this opinion I feel impelled to say that this statute has been in force for a period of 22 years. Hundreds of thousands of dollars of the public money have been expended in maintaining suitable offices and paraphernalia for carrying out the purposes of the act, to say nothing about the amounts paid in salaries to the state engineer and his deputies, assistants, and clerks. It cannot be denied that a system whereby a complete record is required of rights and titles to the use of water is infinitely superior to a system, if it can be called a system, in which the evidence of title rests entirely in parol and depends solely upon the memory of man. It may be contended that this goes to the policy of the act which belongs exclusively to the Legislature, and is therefore outside the domain of judicial interpretation. We contend, however, that if the policy of the act is manifestly wise and superior to previous systems from the standpoint of policy, it is one of the most cogent reasons why we should hold that the Legislature must have intended exactly what it said and has repeated and reiterated time after time for almost a quarter of a century." (Concurring opinion of Mr. Justice Thurman in *Deseret Livestock Co. vs. Hooppiania,* supra)

"But respondents argue that all these cases, except the one last cited, were either tried or were based upon rights claimed to have been acquired prior to the enactment of the law of appropriation of water through the office of the state engineer, and (1) since the enactment of that statute, water rights can only be acquired

by appropriation through the office of the state engineer and can only be lost by abandonment, and when abandoned it reverts to the state; and (2) if water can be acquired by adverse user and possession since the enactment of the appropriation laws, it cannot be so done after adjudication of the rights, and in defiance of the terms of the adjudication decree. The answer to the first proposition is found within the terms of the statute, relative to appropriation. Sections 100-3-1 and 100-3-2, R.S. 1933, read:

> 'Rights to the use of the unappropriated public waters in this state may be acquired by appropriation in the manner hereinafter provided, and not otherwise.' Section 100-3-1.
>
> 'Any person who is a citizen * * * in order hereafter to acquire the right to the use of any unappropriated public water in this state shall before commencing the construction * * * make an application in writing to the state engineer.' Section 100-3-2.

It is clear from the language that the sections above quoted apply only to acquiring rights in the unappropriated public water, and have no reference to water rights which have passed to private ownership until they have been abandoned and thereby reverted to the public. How may water rights under the statute be lost? Section 3468, Comp. Laws 1917, in force during the times involved in this action, reads:

> 'When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public, and may again be appropriated, as provided in this title; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.'

Construing this section, this court in *Deseret*

Live Stock Co. v. Hooppiania, 66 Utah, 25, 239 P. 479, 481, said:

> 'By express language of the foregoing statute there are two methods or means by which one entitled to the use of waters in the state may lose such right: (1) by abandonment; and (2) by ceasing to use the same for a period of seven years.'"

(*Hammond v. Johnson,* 94 Utah 20, 66 Pac. (2nd) 894, 899; also 94 Utah 35, 75 Pac. (2nd) 164)

"Under our laws, rights in and to the use of public waters, or of a natural stream or source, may be acquired only by appropriation and by an actual diversion of waters from the natural channel or stream and a beneficial use made of them and as by our statutes provided. Neither the defendants nor their predecessors made any diversion of the waters of the creek for watering live stock or for any other purpose. They, without any diversion, merely permitted animals to drink directly from the creek. That gave them no right to or possession of the use of the waters, for as said by the author, 2 Kinney on Irrigation and Water Rights, 1242 that as 'no possession or exclusive property (of water) can be acquired while it is still flowing and remaining in its natural channel or stream, it follows, therefore, that in order to obtain possession of the water attempted to be appropriated, it is an indispensable requisite that there must be an actual diversion of the water from its natural channel into the appropriator's ditch, canal, reservoir, or other structure.' Cases are there cited in support of the text." (*Bountiful City v. De Luca,* 77 Utah 107, 118; 292 Pac. 194, 199; 72 A.L.R. 657)

"If this be new or added water, no right thereto can attach or be asserted until after an application has been filed in the office of the

state engineer. *Deseret Live Stock Co. v. Hooppiania,* 66 Utah 25, 239 P. 479; *Bountiful City v. De Luca,* 77 Utah 107, 292 P. 194, 72 A.L.R. 657. If it be considered as merely a change in place of diversion, it also must start with an application in the office of the state engineer, and notice must be given so interested parties could be heard and their rights protected. Appellants pleaded in their answer, and testified, that the proposed works would save from evaporation and seepage a considerable quantity of water and the Company would permit the Town to divert into its pipe line a part thereof in consideration of the Town doing the work and furnishing the money to effect the savings. No application was made to the state engineer either to appropriate this water or to change the point of diversion of their water. It is admitted that defendants' works would inclose the entire stream now flowing in its natural channel, thus excluding everyone (the public) from enjoyment of all rights therein. When a person seeks to do this, he has the burden of showing his right so to do, and this burden appellants did not carry." (*Adams v. Town of Portage,* 95 Utah 1, 72 Pac. ((2nd) 648, 654

"What we did say was that the records (the pleadings of appellant and the evidence) show the waters in dispute, from which appellant sought to exclude respondents and the public generally, were waters which appellants had not appropriated, either by user before enactment of the statutory method, chapter 100, Laws Utah, 1903, now Rev. St. 1933, 100-3-1 et seq., or by application in the office of the engineer since such method was prescribed. The trial court so found, and we upheld that finding. Thus, holding that appellants had never had any rights to the waters used by respondents, the question of adverse user since 1903 is in nowise determinative of the cause."

(*Adams v. Town of Portage,* 95 Utah 20, 81 Pac. (2nd) 368 on rehearing)

"In the light of this evidence we proceed to consider the defenses urged. First, as to the defense of valid appropriation. We conclude that if these defendants had made a valid appropriation prior to the Kimball Decree, all rights secured thereunder would have been lost by the entry of that Decree which awarded them no water. Since the entry of the Kimball Decree in 1922, in fact since 1903, the method for appropriation of unappropriated water has been prescribed by statute and we have consistently held that this statutory procedure for appropriating water is exclusive. *Hammond v. Johnson, supra; Adams v. Portage Irr. Reservoir, & Power Co., supra; Deseret Live Stock Co. v. Hooppiania, supra; Bountiful City v. De Luca,* 77 Utah 107, 292 P. 194; 72 A.L.R. 657. Although this statutory procedure has been amended at various times (see Chap. 105, Laws of Utah 1935, Chap. 111, Laws of Utah 1939) at all times since 1903 the statutory procedure has required a filing of an application with the State Engineer. The evidence fails to show that this procedure was followed by these defendants and their defense of valid appropriation must fail." (*Wellsville East Field Irr. Co. v. Lindsay Land & L. Co.,* 104 Utah 448, 137 Pac. (2nd) 634, 644)

3. ARGUMENT

(A) *The waters on defendants' land in Sec.* 9 *and* 22 *were not and are not subject to appropriation or prescriptive user.*

The findings of the jury do not disclose the nature, source, origin, kind or quantity of water which plaintiff and his witnesses assert exist and has existed upon

defendant's lands in Sections 9 and 22, Twp. 2 S., Range 5 West, Salt Lake Base and Meridian. The responses by the jury to the interrogatories propounded to it by the Court simply indicate the time element involved in plaintiff's alleged use of the waters based on an assumption that water in some amount existed on Secs. 9 and 22, during the duration of use. It is therefore necessary to examine and consider the relevant evidence in order to determine the necessary facts with respect to said water.

Insofar as the defendant's evidence is concerned, it denies the existence of water and "water holes" on said lands (R. 136) and presents proof that at the most there existed during certain seasons of certain years only "bogs" or "mud holes" located in certain small restricted areas (R. 177, 178, 179, 186). They were occasioned by precipitation primarily and flow of melting snows and probably by a small amount of percolating water in defendant's land which came to the surface and then gravitted to low places on said land (R. 137). The source of this small amount of moisture is not directly disclosed by the evidence. Defendant's evidence was corroborated by that of the witnesses, Aldous, Palmer and Price, who testified that there was a "bog" on Sec. 9, but no water holes (R. 175, 177, 178, 179, 181, 241, 242).

Plaintiff's evidence in the main contradicts that of of the defendant. Plaintiff and his witnesses testified as to water and "water holes" but never mentioned the source of the water. It is interesting to note that plaintiff's evidence during the course of trial became progressively more "moist" and "wetter." Commencing with

plaintiff's own testimony in his case in chief—"The whole place is not covered with water. There are holes watered. Did you ever see a cow make a track * * *" (R. 86). "There is not enough water to flow away" (R. 87). (Plaintiff testified there existed a water hole in SE ¼ Sec. 9 Sec. 22) (R. 63, 64, 83, 84). He marked these alleged holes on the map P Ex. 1 (R. 64). When plaintiff testified on rebuttal, the *one* water hole in Sec. 9 became (R. 83) *four* holes (R. 279) and they contained water during all months of the year and they always contained water that cattle could and do use (R. 279, 280). *Pierre Castagno* produced sufficient water in these "holes" to water 30 or 40 horses (R. 255). *Tony Castagno* asserted that the "holes" never dried up and contained water during all years at all times in sufficient amount to water cattle (R. 295). *Rose Castagno* asserted that the "holes" never dried up and there was water in them at all times of drinkable quality (R. 304). *Keith Wanless* called the water accumulations "spring holes" (R. 309). He said they contained "spring water" not "run off" water (R. 316) but did not identify the source of the water. Cattle drank at the so-called "holes" (R. 310).

The conflict in the evidence as to whether water existed on the defendant's lands was not resolved by the jury. It remains a question of fact for the fact finder. If no water is found to exist, then of course the defendant is entitled to judgment on this issue. However, defendant believes it expedient to present his argument on the assumption (and this is an assumption in favor of plaintiff and is made for purposes of argument only) that *some kind* of water and of some (but

unknown amount has existed on Secs. 9 and 22 aforesaid.

Plaintiff's evidence identifies this water as either (a) waste or seepage water, or (b) surface water, or (c) percolating water. It is certainly not water flowing in an established course. It is not water in a pond. It is not water flowing directly from a spring. It is not "live" water. It is not "natural" water. It possesses certain elements of "surface" water and certain elements of percolating water. Interpreting the evidence in a light most favorable to plaintiff, the water appears to be "dead" water representing moisture which has accumulated in low places on defendant's land during certain periods of the year depending upon amount of natural precipitation and seepage from other areas.

The water thus identified and described by plaintiff and his witnesses is exactly the type and kind of water that is not and never has been subject either to formal appropriation under the water laws nor subject to be acquired by prescriptive user. The authorities cited above from Utah and neighboring states without contradiction declare this principle. Quoted authorities on irrigation and water law, after defining waste or seepage water, surface and percolating water, unanimously declare that the use thereof *cannot be acquired by prescriptive user.* It is not the type or kind of water described in *Sullivan vs. Northern Spy Mining Co.,* 11 Utah 438, 40 Pac. 709, 55 A.L.R. 1448, but rather it classifies under the heading of percolating water *"rising in the form of a bog or marsh"* as was involved in *Willow Creek Irrigation Co. v. Michaelssen,* supra, or underground percolating water of *Cresent Mining Co. vs. Silver King Mining Co.,* supra.

Allowing the evidence in this case its maximum thrust in favor of plaintiff, it falls far short of establishing and identifying the water on defendant's lands as being water subject to appropriation or the use of which may be obtained by prescription. Part of this water was and is undoubtedly a component part of the earth owned by defendant, percolating through defendant's soil and finally coming to the surface to form bogs or marshes. It can be surmised that other parts of it represent melting snow and rain which have fallen on the surface of defendant's land and then drained to low places on his land. Plaintiff's evidence does not even imply or suggest that any part of it came from artesian wells driven by plaintiff in Secs. 9 and 22. His evidence carefully eliminates this source because they were driven only within the last two or three years.

In resolving the conflict in evidence the court made the following findings:

> "19. A small but uncertain amount of water has accumulated during certain seasons of years upon lands of defendant situated in Sections 9 and 22, Township 2, Range 5 East, Salt Lake Base and Meridian, for 20 years prior to May 31, 1955. It has not been and is not water of the type, kind or quality that title thereto or use thereof can be acquired by prescription, adverse possession or adverse user, being either waste water, surface water or percolating water. Such water has accumulated in low places consisting of swales and marshy areas of these sections. It has remained in low areas and has not flowed out upon adjoining land. Much of the water is surface water which was produced by rainfall and melting snows.

Its quantity has varied from year to year. During dry seasons of the years and during years of small or limited precipitation the small amount of water in these low areas disappeared and the low areas became mere bogs or mud holes. During certain periods of the years when water accumulated in these low places wandering cattle owned by plaintiff and others drank at these lo wplaces. Neither plaintiff nor his predecessors in title and interest have ever attempted any appropriation of said water under the statutes of the State of Utah. This accumulation of water does not originate or flow from any natural water course nor has it ever originated or flowed from any natural water course. A small proportion of this water is probably water which percolates and has percolated through the soil of defendant's lands and finally came to the surface in the low areas described. Said amount of said water forms and has always formed a part of the realty which has belonged and now belongs to defendant. There is no known and defined subterranean stream on defendant's land or in the vicinity thereof wherein this water might originate."

The trial court found in favor of the defendant on this aspect of the case. He is therefore entitled upon appellate review to have the evidence and every reasonable inference fairly to be drawn therefrom to be viewed in the light most favorable to him. (*Buehner Block Co. vs. Glezos,* 6 Utah 2d 226, 310 P. 2d 517; *Beck vs. Jeppson,* 1 Utah 2d 127, 262 P. 2d 760.)

Furthermore, when the testimony is conflicting the appellate court will not disturb the findings of the trial court unless so manifestly erroneous as to demonstrate some oversight or mistake affecting the substantial rights of appellant. (*Klopenstine vs. Hayes,* 20 Utah 45, 57

Pac. 712; *Singleton vs. Kelly,* 61 Utah 277, 212 Pac. 63, 66; *Olivero v. Eleganti,* 61 Utah 475, 214 Pac. 313; *McMonegal vs. Fritsch Loan and Trust Co.,* 75 Utah 470, 268 Pac. 635.)

There is substantial evidence to sustain the foregoing findings. It was the duty of the trial court to resolve the conflict, and having resolved the conflict in defendant's favor, the rules cited above apply.

It is therefore the contention of defendant that under the law and facts of this case that plaintiff did not and could not acquire a prescriptive use of the waters on defendant's land in Secs. 9 and 22 for the reason that the proof shows they were either (a) waste or seepage water, or (b) surface water, or (c) percolating water, or a combination of same. The law denies that the use of such water may be obtained by prescription, because such water is *not* "water" of the type, nature or kind subject to appropriation or prescriptive use.

(B) *In the alternative, if it be adjudged that the waters on defendant's land in Secs. 9 and 22 have been and are waters subject to the law of appropriation and prescription, then plaintiff did not and could not acquire a prescriptive use of same.*

In the event the Court refuses to adopt defendant's contention and theory above presented that the waters on defendant's land were not and are not subject to the law of appropriation and prescription and reaches the conclusion that they were and are waters subject to appropriation and prescriptive user, then defendant emphatically asserts that plaintiff, under the law of

Utah, could not and did not acquire a prescriptive right to use same.

Neither plaintiff nor defendant has made any filing in the office of the State Engineer appropriating said waters and neither of them have actually diverted said waters from their natural collecting basins by means of ditches, canals or other structures. Under this hypothesis the waters are public waters under the quoted Constitutional provision, statutes and decisions of the Utah Supreme Court. This court faces two alternatives: (1) it must declare that these waters are not "water" under the water laws of Utah, but are waters of the type and kind described in *Willow Creek* and *Crescent* and not subject to appropriation or prescriptive user, or (2) it must declare these waters to be *public waters* owned by the *public*. There is no other choice. The argument which follows is submitted on the assumption (and without de-emphasizing defendant's first contention and line of defense) that the Court adopts the second alternative.

Defendant, in this brief, has summarized the history of present Sec. 73-9-1, Utah Code Ann. 1953, from the year 1903 to the present which is the vital and determining statutory enactment in this case. The original 1903 statute effective May 11, 1903, during the passage of the years has been amended and re-written many times, but it has always retained either in form or substance this vital mandate:

> *"Rights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise."*

As the cited decisions of the Utah Supreme Court disclose, this provision of law (and its amendments and amplifications) have been the subject of judicial construction with resultant legislative amendments. However, one clear certain fact shines through all of the decisions (many of them involving complicated and complex situations) and legislation, and that is that the use of *unappropriated public waters* since May 11, 1903, can be acquired only through the methods prescribed by the legislature *"and not otherwise."* As to these waters, the acquisition of same by prescription has been outlawed since May 11, 1903.

The two decisions which announce this rule are *Hooppiania* and *Hammond v. Johnson.* There has never been any deviation from the rule pronounced by them and the rule therein laid down has been a fixed, unquestioned rule in Utah since May 11, 1903. The controversy which arose in connection with the interpretation of this statutory provision involved *waters the use of which had passed from the public to private ownership and not as to waters which were "public" waters.* The final form of the statute as it appears as Sec. 73-3-1, Utah Code Ann. 1953, represents the legislative determination that even as to *"private water"* there can be no acquisition of use by prescription. All through the years the dispute has never involved the rule of *Hooppiania* and *Hammond* as applied to public waters, but always as to whether the statutory negation *"and not otherwise"* applied to waters the use of which had passed from the "public" to "private ownership." An examination and analysis of the cited decisions and of the many

authorities discussed and cited therein shows that the Supreme Court persistently made the distinction herein elucidated. It is in the cases where the use of water had passed to private ownership that the Court refused to apply what may be called the *"not otherwise"* rule governing public waters and engaged in discussions concerning the questions of abandonment, non-user, adverse user, forfeiture, interruption in usage and the like questions. *Lindsay* graphically demonstrates the distinction. In that case the irrigation company had obtained a court decree fixing and determining the water rights in Little Bear River. Lindsay and its predecessor were not parties to the decree and continued to use water from the river not decreed to them. The contest was between private parties. Judge Larsen in *Hammond* pointed up the distinction in his declaration:

> "But neither abandonment nor forfeiture by non-user takes cognizance of or applies to a situation where a third party has entered the scene." (66 Pac. (2nd) at 900)

Commencing with March 20, 1939, the Legislature applied the rule of *Hooppiania* and *Hammond* to private waters. If there has been and there is water on defendant's said lands (an issue in this case) and the same is not waste or seepage water, surface or percolating water, then it always has been and is now "public water" within *Hooppiania* and *Hammond*. On this hypothesis, plaintiff never has acquired prescriptive use of same because of the prohibition of the statute effective from May 11, 1903, to the present date. If the date of filing plaintiff's cross-complaint (Jan. 6, 1956) be taken, then the elapsed time since May 11, 1903, is 52 years, 7

months and 25 days. If the date plaintiff commenced this action (May 31, 1955) be taken then the elapsed time is 52 years and 20 days. During all of this time the 1903 statute and its amendments and amplifications absolutely prohibited the plaintiff from acquiring the right to the use of the water by prescription. The findings of the jury is to the effect that plaintiff and his predecessors in ownership used said water holes for 50 consecutive years prior to May 31, 1955. Plaintiff and his predecessors therefore commenced to use said water on May 31, 1905, but at this time the 1903 statute was operative as to this water, and forbade the initiation of a period of prescriptive user. It is repeated that neither plaintiff nor defendant has applied to the State Engineer to appropriate said water, as mandated by statute if rights to use same were to be acquired, nor has any diversionary works been erected.

It is interesting to note that plaintiff's witness, Pierre Castagne, is 50 years old (R. 246); that plaintiff's witness, Tony Castagno, is 53 years old (R. 293); that plaintiff's witness, Rose Castagno, fixed the years 1936-1937 as the time she first "helped with live stock" in connection with the Cassity-Castagno land (R. 301, 302, 303); that plaintiff's witness, Wanless, first worked for plaintiff and on his land in 1941 (R. 308). As to Pierre and Tony, manifestly their memories at the maximum cannot go back for more than 40 or 45 years. As to Rose, her testimony would encompass a period of 20 years at the maximum. As to Wanless, 15 years only are within his memory. The plaintiff, himself, was vague and gave no date as to commencement of use of the

waters. He stated that "cattle drank at the holes as long as he can remember." (R. 65). Manifestly this testimony does not prove any use prior to May 11, 1903 (R. 89). It is directed to the time subsequent to said date—all within the interdicted period. The jury's finding that plaintiff and his predecessors used said water holes for 50 consecutive years prior to May 31, 1955, *means exactly what it says.* The underlying evidence would not support a finding of usage prior to May 31, 1905.

Under this state of the law and the facts, defendant contends and submits that plaintiff obtained no prescriptive right to use these waters. It becomes entirely immaterial as to when the defendant's lands passed from ownership of the United States to private ownership. The doctrine of *Sullivan v. Northern Spy Mining Co.,* supra, as recognized by the Act of Congress of July 26, 1866 (43 U.S.C.A. 661) is to the effect that

> "To initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the state in which the water is found." (*Sewards v. Meagher,* 37 Utah 212, 108 Pac. 212)

governs the situation as disclosed by the evidence in this case. Under the law of the State of Utah, plaintiff could acquire by prescription no rights in the water on defendant's land.

With the disappearance of plaintiff's alleged rights in the water there also disappears any rights of ingress or egress for its enjoyment. Such implied easement must find its existence in the right to the water and when no right to the water exists there is no easement (*Wendler v. Woodward,* 93 Wash. 684; 161 Pac. 1043).

PART B

ANALYSIS OF APPELLANT'S OF ERRORS IN ARGUMENTS LEGAL AUTHORITIES AND DEMONSTRATION

POINTS I AND II. It is respectfully submitted that Respondent in Part A — Respondent's Argument and Demonstration of Validity of Judgment — has fully demonstrated the validity of the judgment in this case in his favor and has thereby shown to the Court that Appellant's arguments in support of these points in his brief are unsound and not supported by either the law or the facts in this case. It is believed that there is no necessity of further comment on these points.

POINT III covers rulings of the trial Court in the exclusion of evidence. Each ruling will be treated separately.

1. The excluded evidence pertained to a supposed right to trail cattle from an area marked on P Ex. I in pink bearing the figure "3" to the "old homestead" being shown on said exhibit in pink and marked with the figure "2." In none of Plaintiff's pleadings did he allege any such trail way easement. The basis of his claim for such easement related only to trailing cattle to and from Stansbury Island (R. 258, 259, 260, 263). Plaintiff's allegations in paragraph 1 of his first separate defense (Record of Appeal, Plaintiff's Answer to Defendant's cross claims) are definitely tied to the so-called Stansbury Island "trailway." The attempted production of this evidence at the trial was a surprise to Respondent as there was no warning pleading of any such claim.

The Court properly struck such evidence (R. 263).

2. Appellant propounded this question to the Witness Pierre Castagno:

> "Do you have an opinion, Pierre, as to how the quantity of forage consumed and trampled down, by making this trail use of your brother (Respondent) would compare to the quantity of forage which his land about which you have just testified? (R. 269).

In explanation of this question Appellant's counsel said:

> "I believe it shows he made use of these lands for the period which we are here involved with a certain number of head of cattle and a certain way. What I am trying to show is how that use compares to the total quantity of forage which is supported or produced by the lands, he, himself, owns within this very area." (R. 270).

The "he" referred to in the explanation is the Respondent, Castagno (R. 270). The Court then asked: "Are you trying to compare damages now?" (R. 270). Appellant's counsel responded: "It would have that result, yes." (R. 270). The Court sustained Respondent's objection to this question. The ruling was proper as the answer of this witness to this question would in no sense bear on the question of damages accruing to the Respondent by virtue of the Appellant using Respondent's land as a trailway. The comparison between the amount of forage consumed by Appellant's cattle on Respondent's lands and the total amount the land would produce is not the correct measure of damages for the trespass (52 Am. Jur. —Trespass—Sec. 49, pp. 873-875).

3. The excluded testimony pertained to an alleged conversation between Appellant and Appellant's deceased

father-in-law relative to the quantity and quality of water in the so-called "water holes" (R. 278, 279). The testimony was hear say. (Jones on Evidence (Ed. De Luxe) Sec. 297; Wigmore's Code of Evidence, Rule 147, P. 259).

4. This action was tried in January, 1957. Appellant's counsel propounded this question to Appellant: "Have you seen cattle watering in *this dry year?*" (Emphasis supplied). The answer was "Yes." The complaint in this action was filed on May 31, 1955. Upon motion of Respondent the Court struck Appellant's answer. Thereupon Appellant was asked by his counsel: "Is this as dry a year as during any of the years prior to 1955?" (R. 282). The witness answered: "Yes." He was then asked: "Is it drier?" Objection was sustained. The Court was correct in its ruling. The condition in 1957 — "This year" (which was subsequent to the commencement of the action) was not a proper reference base upon which to draw an inference as to prior conditions.

5. The following excerpt applies to this alleged error:

> "Q. Do you know, Mr. Cassity, approximately when the homestead was filed by Mr. Castagno on the lands marked with a "numeral 2?"
>
> "THE COURT: Hasn't that been stipulated?
>
> "MR. OMAN: As to the date the patent was issued, but not the date he filed it.
>
> "MR. RITER: That is immaterial, and I object to it.
>
> "THE COURT: Do you object on the ground that it's not the best evidence?
>
> "MR. RITER: Yes.
>
> "THE COURT: The objection is sustained."

It requires no citation of authorities to show that Appellant could not prove matters pertaining to the homestead application of Castagno by mere oral statements of Cassity as to date of filing of the homestead application by Castagno in the Federal General Land Office. No foundation was laid for the admission of this secondary evidence. If relevant and material to the issues in this case there was a way of proving such facts, but not by the method followed by Appellant in this instance. The best evidence rule clearly forbids such method of proof. There was no error.

6. This alleged error in exclusion of evidence will be discussed hereafter in connection with the discussion of Point V of Appellant's brief.

POINT IV. Through clerical error the Findings of Fact and the Judgment erroneously attributed to the Respondent ownership of the following land:

> NW¼NE¼; NE¼NW¼; SW¼NW¼ and W½-SW¼, Twp 2South, Range 5 West, Salt Lake Base and Meridian.

This land in truth is owned by Appellant. The ownership paragraph of Finding 3 and Paragraph 7 (A) of the Judgment should be corrected by eliminating said lands from an adjudication of Respondent's ownership.

POINT V. Appellant asserts that a "promissory estoppel" exists as against Respondent as a justification of Appellant over running Respondent's land with cattle owned by Appellant. This claim is based on fragmentary evidence given by the Respondent on a Rule 43 (b) examination at the trial (R. 10, 11). Appellant's pleadings in this case raise no such issue. Neither in his

original complaint nor in his supplemental complaint did he make allegations that his alleged right to trail cattle over Respondent's land was based on conduct of Respondent which created an estoppel.

> "In pleading an estoppel in pais, the rule prevails that the plea must be certain in every particular, and must allege every material fact which the pleader expects to prove or upon which the estoppel is predicated. The estoppel must be pleaded with the same fullness and particularity as are required in cases involving like subjects of inquiry in suits in equity." 19 Am. Jur. Estoppel Sec. 193." (Am. Jur. Pleading and Practice Forms —Estoppel, Vol. 8, P. 181).

Under this argument, estoppel — whether it be in pais or a so-called "promissory estoppel — is "an element of the cause of action." It must be pleaded. (*Berow etal vs. Shields et ux,* 48 Utah 270, 159 Pac. 538; *Barber vs. Anderson,* 73 Utah, 375 274 Pac. 136; Annotation 120 ALR 105). Respondent again invites the Court's attention to the fact that Appellant's case, as based on his pleadings, is based solely on the claim of prescriptive user. The trial court properly struck the evidence relating to an alleged transaction pertaining to the "homestead" land of Respondent (R. 11) in view of the state of the pleadings. However, it should be noted that Appellant's counsel did not at the time of the trial claim it supported the claim of an estoppel. He asserted "* * * but now he (Castagno) has refused to sell that out, because of things which have transpired between the parties here, and he has come to interfere with this operation of Cassity. I claim that actually—." For the foregoing reason, the Court was correct in striking the evidence pertaining

to an alleged agreement of the Respondent to sell Appellant the "homestead" land (R. 10, 11). (See also Point II, 5 of Appellant's brief at page 28), and in not allowing Appellant's counsel to pursue such line of questioning. It will be noted that Respondent acted promptly to eliminate testimony on this point as soon as it became apparent the purpose thereof (R. 10, 11).

CONCLUSION

The vein of thought runs through Appellant's brief that his claimed *necessity* of using Respondent's land for the operation of his live stock business, gives him some kind of legal right to subordinate it to his use and convenience regardless of the rights of Respondent. The judgment in this case denies such philosophy. It upholds the doctrine that each man should use his own property in such manner as not to injure his neighbor. The judgment should be affirmed, except to the correction of the clerical error above noted.

Respectfully submitted,

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was the same and the same reasons e given for desiring the severance. e situation here is analogous to the exple given in the Restatement of the Law Judgments, Sec. 61, Comment c, where is pointed out that where there have n two batteries by and against the same son at different times the principle of judicata does not apply because the nsactions are different "even though un- the pleadings in the first action evi- ıce as to the second battery would have n admissible and would have sustained first action."

[4] Although the court in the prior acn had found from the evidence presented it that justice and equity required a rerance and in the ordinary case where judgment has been granted on issues ıich have been litigated between the same rties such issues under the doctrine of llateral estoppel [3] cannot be relitigated in subsequent but different cause of action, is doctrine does not apply here because at doctrine does not have any bearing on e question here presented. That doctine only applies where a question of fact sential to and determinative of the judgent is actually litigated and determined a valid or final judgment which is conusive as between the parties to a subseent action on a different cause of action. ince this action is based on a new and fferent ordinance which necessarily reıires the determination of essentially difrent facts from those determined in the revious action that doctrine can have no pplication to this case.

Another and controlling reason why reıondent's position cannot be sustained is ıat in the former action the court severed ıe land from the city, but if we were to ffirm the trial court's decision that apellants cannot maintain this action, the ffect would be to overrule the previous ecision and hold that appellants may not ow assert the rights therein granted them. In other words, the effect which respondent claims for the previous decision in this case is that the city may take actions which completely nullify the severance decreed in that action, but because there was a former action appellants are forever barred from contesting the annexation of their property to the city because the court in the previous action determined similar issues in their favor. Such decision not being adverse to appellants' claim in this action does not have the effect of preventing them from maintaining this action. Such a holding would have the effect of reversing the decision which is now claimed to be determinative of this case. This strange result clearly demonstrates that the issues are different in the two cases.

Reversed. Parties to bear their own costs.

McDONOUGH, C. J., and CROCKETT, WORTHEN and HENRIOD, JJ., concur.

WEST KEY NUMBER SYSTEM

Joseph Lavern BOYER, Plaintiff and Appellant,

v.

Clifford CLARK, Defendant and Respondent.

No. 8681.

Supreme Court of Utah.

May 23, 1958.

Action to have a road declared a public highway and to restrain defendant from interfering with travel by the public and for damages. From a judgment of the Third District Court, Summit County, Charles G. Cowley, J., in favor of defendant, the plaintiff appealed. The Supreme Court, Wade,

J., held that evidence that for a period exceeding 50 years, the public, even though not consisting of a great many persons, because comparatively few people had need to travel over it, made a continuous and uninterrupted use of wagon trail in traveling by wagon and other vehicles and by horse as often as they found it convenient or necessary, and that they trailed cattle and sheep, hauled coal, and used such trail for other purposes in traveling from Grass Creek and various other points to and from highway was sufficient as matter of law to establish a highway by dedication.

Reversed with instructions.

Dedication ⇐37

Evidence that for a period exceeding 50 years, the public, even though not consisting of a great many persons, because comparatively few people had need to travel over it, made a continuous and uninterrupted use of wagon trail in traveling by wagon and other vehicles and by horse as often as they found it convenient or necessary, and that they trailed cattle and sheep, hauled coal, and used such trail for other purposes in traveling from Grass Creek and various other points to and from highway was sufficient as matter of law to establish a highway by dedication. U.S.C.A.1953, 27-1-3.[1]

Boyden, Tibbals, Staten & Croft, Salt Lake City, for appellant.

Fowler & Matheson, Salt Lake City, for respondent.

WADE, Justice.

This action was commenced by Joseph Lavern Boyer to have Middle Canyon Road declared a public highway, to restrain respondent, Clifford Clark, from interfering with travel by the public and for damages. This appeal is by the plaintiff Boyer from the judgment entered in favor of the defendant, respondent.

The road in question is a wagon trail which runs in a northerly direction up Middle Canyon and over a ridge into Grass Creek from State Highway 133, which goes easterly up Chalk Creek Canyon from Coalville to Upton, Utah and beyond. The junction of this wagon trail with State Highway No. 133 is in Section 33 on respondent's property over which it traverses from 750 to 1500 feet to the north half of Section 33 and from there over the north half of that section on land owned by one Erconbrack into Section 28 belonging to appellant. It also continues to the north across Section 21 before Grass Creek is reached. It was a part of the public domain until title passed from the Government to the Union Pacific Railroad Company to which patent issued in 1902.

The undisputed testimony of James H. Judd who was about 84 years old at the time of the trial in 1956 was that his home had been in Upton when he was 8 or 10 years old when he first became acquainted with Middle Canyon Road while helping his father haul coal from mines in Grass Creek. He also testified that he had used the road for over 50 years when hauling coal, crossing the open range, driving cattle, sheep and courting the girl he later married in Grass Creek. He further testified that anyone who wanted to, used the road to haul coal, drive sheep and cattle or ride horses or wagons over it. There was also testimony of a number of other witnesses that the use of the road was not changed after patent was issued and anyone who wanted to use it to go deer hunting or visiting with people living in the vicinity or to dances which were held in Grass Creek did so, as well as those who used it to trail sheep or cattle. No one testified that prior to the time respondent acquired the property in question permission was asked or obtained from any owner to traverse the trail. The use of the road was not great because comparatively few people had need to travel over it, but those who had such need, did so. Within the past few years prior to the

l of this action in 1956, both appellant respondent have put no trespassing ıs on their properties and have attempted :harge deer hunters who wanted to use ir properties. However, no objection ; made nor did any of the owners of perty over which the trail traversed :mpt to interfere in the public's use until pondent tried to prevent such use a short :e before this action was commenced. spondent became the owner of the land in :stion approximately 12 years before the nmencement of this action. He testified it since he has become acquainted with : trail, it does not extend to Grass Creek, t ends somewhere up Middle Canyon. ddle Canyon Road has never been mainned at public expense.

The court as the trier of the facts found at appellant "had failed to produce suffi:nt evidence to establish a public highay * * *."

In Lindsay Land & Livestock Co. v. ıurnos, 75 Utah 384, 285 P. 646, 648, this ıurt pointed out that Congress in 1866 ıacted Section 2477, Revised Statutes of .e United States (43 U.S.C.A. § 932) herein it granted the right of way for ıblic highways over public lands not re:rved for public uses, and that an acceptıce of such grant could be made "by public se without formal action by public authorıes, and that continued use of the road y the public for such length of time and nder such circumstances as to clearly inicate an intention on the part of the public ɔ accept the grant is sufficient." We furher pointed out that under our territorial aws a continuous and uninterrupted use of road by the public for a period of 10 years vas sufficient to create a public highway ɔy use, and where the evidence showed that 'while the lands traversed by the road were ɔublic lands of the United States the road vas used as a public thoroughfare" for a ɔeriod exceeding that required by our statıtes for creating a public highway by use, such evidence is sufficient in law to amount of the right of way over the public lands, and thus would constitute and create the road in question a public highway by dedication." See also Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 423.

The uncontradicted evidence in the instant case disclosed that for a period exceeding 50 years, the public, even though not consisting of a great many persons, made a continuous and uninterrupted use of Middle Canyon Road in traveling by wagon and other vehicles and by horse from Upton to Grass Creek and other points as often as they found it convenient or necessary. They trailed cattle, and sheep, hauled coal, and used this trail for other purposes in traveling from Grass Creek and various other points to and from Highway 133. This evidence was sufficient as a matter of law to establish a highway by dedication and the court erred in finding otherwise. The highway once having been established by such use, it is provided by statute, Sec. 27-1-3, U.C.A.1953, that it "* * * must continue to be highway(s) until abandoned by order of the board of county commissioners * * * or other competent authority."[1] There is no contention that any such procedure has been invoked here.

Due to the fact that the trial court did not find it was a public highway, it failed to find on two further issues dependent upon such fact, which it will be necessary to determine upon remand: (1) the width of the highway, which must be determined in accordance with what is reasonable and necessary for the uses to which the road has been put; (2) any damages proximately resulting to the plaintiff by the wrongful conduct of the defendant in closing and excluding him from the roadway.

Reversed, with instructions to proceed in accordance with this opinion. Costs to plaintiff.

McDONOUGH, C. J., and CROCKETT, WORTHEN, and HENRIOD, JJ., concur.

Clayton FREYTAG, Orva Miller, Meldrum M. Rinearson and Candace Rinearson, Appellants,

v.

Adeline VITAS, Executrix of the Estate of John Vitas, deceased, Defendant,

Adeline Vitas, unmarried, John K. Vitas, unmarried, Nick Vitas, unmarried, Appellants,

Jack Houston, Leona Vinson, Defendants, State of Oregon, Respondent,

and

J. D. Mitchell, Intervenor-Appellant.

Supreme Court of Oregon,
Department 2.

Argued and Submitted Jan. 8, 1958.

Decided May 28, 1958.

Suit to quiet title to gravel bar in Villamette River. The Circuit Court, lackamas County, Ralph M. Holman, J., ntered a decree holding title to be in de-ndant, and appeals were taken. The upreme Court, Warner, J., held that vidence would not sustain plaintiffs' con-ntion that land involved had not been i island at low water during effective eriod of statute relinquishing state's title all lands on Willamette River lying tween high and low water marks.

Affirmed.

Quieting Title ⇦10(1)

In suit to quiet title to real property, aintiff must recover on strength of his vn title and not on weakness of his ad-rsary's title.

Quieting Title ⇦44(1)

In suit to quiet title to real property, rden is on plaintiff to establish that he s a perfect legal or equitable title, gardless of status of defendant's title.

Quieting Title ⇦44(1)

When pleadings in quiet title suit ce title in issue, plaintiff has burden showing that title claimed by him is superior to that of defendant; but when each party claims to be owner, burden is upon each adverse claimant to make good his affirmative averments by evidence touching his own title to property.

4. Navigable Waters ⇦42(1)

In suit to quiet title to gravel bar in Willamette River, evidence would not sustain plaintiffs' contention that land involved had not been an island at low water during effective period of statute relinquishing state's title to all lands on Willamette River lying between high and low water marks. ORS 41.310, 41.360(32); Laws 1874, p. 76; Laws 1878, pp. 54, 55.

5. New Trial ⇦2

The statute authorizing granting of new trials applies only to law actions and not to suits in equity. ORS 17.610(4).

6. Judgment ⇦342(1)

After expiration of term, circuit court had no jurisdiction to vacate its decree in quiet title suit unless it appeared from record that it had been without jurisdiction to render judgment; its authority after term time being limited to correction of clerical or formal errors.

7. New Trial ⇦99

Newly discovered evidence is ground for new trial in actions of law but has no application to suits in equity.

John C. Caldwell, Oregon City, for appellants. On the briefs were Beattie, Hibbard & Caldwell, Oregon City, George D. LaRoche and White, Sutherland & Parks, Portland.

Lloyd G. Hammel, Asst. Atty. Gen., for respondent. With him on the brief was Robert Y. Thornton, Atty. Gen.

Before PERRY, C. J., and LUSK, WARNER and KESTER*, JJ.

WARNER, Justice.

This is a suit to quiet title to a gravel

rs in interest were entitled to the full use
it enjoyment of the land. The State of
tah claims no interest in the land. Plain-
f asserts no interest adverse to the State.
o provision of the Enabling Act or of
e Constitution which provide that the
oceeds from the sale of such lands shall
nstitute a trust fund is in any manner
ıpinged—even by indirection—by uphold-
g plaintiff's title. It is difficult to see how
ıder such circumstances the defendants
ɔuld claim that their failure to demand
ıe issuance of patent or the state's delay
ı issuing it could defeat plaintiff's claim
ɔ title by adverse possession by the bald
ɔsertion that such possession was adverse
ɔ the state. The trial court did not err
ı rejecting such contention.

The judgment below is therefore affirmed. Costs to respondent.

CROCKETT, WADE, WORTHEN, and HENRIOD, JJ., concur.

AUTO LEASE COMPANY, a partnership, Plaintiff and Appellant,

v.

CENTRAL MUTUAL INSURANCE CO., a corporation, Defendant and Respondent.

No. 8746.

Supreme Court of Utah.

May 13, 1958.

Action by insured on policy to recover for damage to automobile which it had purchased and which had been damaged while being transported. The Third Judicial District Court, Salt Lake County, Stewart M. Hanson, J., rendered judgment for insurer and insured appealed. The Supreme Court, Crockett, J., held that under policy insuring five of insured's automobiles and providing that, if insured acquired ownership of another automobile and so notified company within 30 days following delivery, policy applied to such automobile as of date of such acquisition, if such automobile replaced an automobile described in policy, insured was not entitled to recover for loss of automobile which was intended to replace another automobile but which was lost during delivery while automobile to be replaced was still in service.

Affirmed.

1. Judgment ⇐178

Motion for summary judgment is in effect a demurrer to contentions of adverse party and states that, conceding facts to be as claimed by adversary, there is no basis for recovery.

2. Appeal and Error ⇐934(1)

On appeal, all aspects of case are considered in light most favorable to party against whom motion for summary judgment was granted.[1]

3. Insurance ⇐146(3)

Rule that in case of uncertainty or ambiguity language of policy should be construed most strongly against insurer because it drew and issued policy has no application unless there is some genuine ambiguity or uncertainty in language upon which reasonable minds may differ as to the meaning, and that requirement is not satisfied because a party may get a different meaning by placing a forced or strained construction on language.[2]

4. Insurance ⇐146(3)

Test to be applied in determining whether there is an ambiguity in language of insurance policy is whether meaning would be plain to a person of ordinary intelligence and understanding, viewing matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in light of existing circumstances, including purpose of the policy, and if it would be rule that ambiguity will be con-

1. Morris v. Farnsworth Motel, 123 Utah
2. Huber & Roland Const. Co. v. South

)oses for which they have been granted. Counsel for respondent has no quarrel with he contention that the state may not dispose)f lands which were the subject of the re-ited grant in violation of the trust thereby mposed, nor with the proposition that a)ossessor may not hold adversely to the tate with respect to such lands. Respond-nt's contention is that under the facts of his case no such issue is confronted.

In support of their position appellants rely eavily upon certain Utah cases. Among iem is the case of Van Wagoner v. Whit-iore, 58 Utah 418, 199 P. 670, which it is)ntended is determinative of the present ase. We are not in accord with this con-:ntion.

In the Van Wagoner case, one Whitmore ad been in open, notorious occupancy and)ssession of the land in question, which nds were subject to the same limitations ı alienability by the state as that here in-)lved, since long prior to the date on which e state of Utah was admitted to the Un-n. He had enclosed the lands with a nce and made other improvements. At e time of the admission of the state of tah to the Union it was provided by law at one who was in possession of land en given to the state by the Federal Gov-nment as grants in aid of schools could ake application and exercise preference ghts for acquisition of title. Whitmore d not pursue this remedy. In 1912 one an Wagoner entered into an agreement purchase said lands from the state of ah and was issued a certificate of sale. tent was issued to him in June, 1916. iereafter he commenced an action in :tment against Whitmore, who by an-er claimed title to the lands by adverse possession. It is quite evident from the statement of the facts that the adverse possession of Whitmore as against Van Wagoner did not commence until after the certificate of sale was issued in 1912. The suit in ejectment was commenced early in 1918. Consequently the requisite period of time, seven years, had not expired at the time of the commencement of the action. The question involved, therefore, was whether or not Whitmore could hold adversely to the state of Utah. And that is the sole question discussed in the opinion of the court on that particular phase of the case. The interest of the state in the land was asserted by a complaint in intervention by the state. Its contention and that of the plaintiff was upheld by this court, such contention being that the predecessor section to Section 78–12–2, U.C.A.1953 [1] could not be applied against the state insofar as the class of lands involved was concerned. It was not a holding, as contended by appellant, to the effect that the statute of limitations could not run against a purchaser from the state until after the issuance of patent.

We have examined the other Utah cases cited by the appellants in support of their position.[2] It would unduly extend this opinion to enter into a discussion of them. Suffice it to say that none of the cases involve a situation such as we here confront: that during all of the time while the plaintiff was in possession of the premises in question and for many years prior thereto the state of Utah held the bare legal title. Final payment of the amount due the state had been made more than a quarter of a century prior to plaintiff's entry. During all of that time the defendants or their predeces-

"Actions by the state.—The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless:

"(1) Such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or,

and profits of such real property, or some part thereof, within seven years."

2. Steele v. Boley, 7 Utah 64; Toltec Ranch v. Babcock, 24 Utah 183; Young v. Corless, 56 Utah 564, 191 P. 647; Utah Copper Co. v. Eckman, 47 Utah 167, 152 P. 178; Livingston v. Thornley, 74 Utah 516, 280 P. 1042.

ad executed and delivered an assignment nd transfer of his interest in the land in uestion. As noted above such assignment nd transfer was not recorded in Beaver County. Under the writ of execution the heriff of Beaver County sold at Sheriff's ale the interest of Lewis in the real estate lescribed in the Land Board certificate. The sheriff's certificate of sale was issued o Holmes on March 28, 1914. No redemption from such execution sale was ever nade. The sheriff's certificate of sale of eal estate on execution was placed on record in the office of the Beaver County Recorder on about the date of its execution. From 1918 to 1940 the lands were, pursuant to statute, assessed in the name of the record owner, namely Gus S. Holmes. Taxes assessed against the lands were not paid and they were sold to Beaver County for nonpayment of taxes on January 2, 1937. Thereafter Beaver County foreclosed its tax lien, and upon entry of a default judgment sheriff's deed on foreclosure sale was issued to Beaver County in 1941.

Plaintiff purchased said property from Beaver County on contract approved June 5, 1941. Final payment was made on December 11, 1945. Ever since June 5, 1941, the plaintiff has been in exclusive, open, continuous, uninterrupted and adverse possession and occupancy of all of the said real property under claim of right and title thereto, and has paid all the taxes regularly levied and assessed thereon according to law. The defendants or their predecessors in title have never at any time been seized or in possession of any part of lands in controversy herein, nor received any part of the rents, issues or profits from said lands.

The lower court held that by reason of the purchase from Beaver County and by reason of plaintiff's adverse possession and occupancy of the land and payment of all taxes regularly levied and assessed thereon for more than seven years subsequent to the final payment to the state of Utah on the contract to purchase from the state, and title to the lands in question as against each and all of the defendants. A decree was entered accordingly and the state of Utah was directed to issue patent to the said lands to plaintiff. It should be mentioned at this point that the state of Utah was joined as a party defendant in the quiet title action of the plaintiff, and the Attorney General on behalf of the state of Utah answered that on March 30, 1914, the state of Utah received final payment for the purchase of the land, and therefore the state of Utah disclaimed any right, title or interest therein and stated that it stands ready, willing and able to issue a patent to such lands in accordance with the judgment of the court.

In answering in the negative the question posed at the outset of this opinion, the position of appellant may be stated as follows: The State Agricultural School lands granted to the state by the federal government are held by the state in trust for the people to be disposed of as may be provided by law and relinquishment of title by the state otherwise than by way of a sale and issuance of patent to a person other than a purchaser, his assignee or successor in interest, is unconstitutional and void and in contravention of the enabling act, the Utah State Constitution and the statutes pertaining to the administration, management and sale of state lands. Counsel refers in support of his contention to the provisions of the enabling act, approved July 16, 1894, 28 Stat. 107, which provides that the grant here involved is for the use of an agricultural college and subject to the restriction that all proceeds from the sale of said lands are to constitute a permanent fund to be safely invested and held by the state with the income thereof to be used exclusively for the purposes of such college. Likewise invoked are the provisions of Sections 3 to 7 inclusive of Article X, Sec. 3 of Article XIII and Sec. 1 of Article XX of the Constitution of Utah, pursuant to the provisions of which all lands granted to the state by congress are declared to be held in trust

land, and statutory and constitutional rovisions that proceeds for sale of land sued constitute a trust fund for colleges ere not in any manner impinged by up-olding plaintiff's title.

Affirmed.

dverse Possession ⇦7(3)

Failure of purchaser from state of nd, which had been granted by federal overnment to state for use of agricultur- college, and his successors in interest to mand issuance of patent or state's delay issuing patent could not defeat claim-t's title to land by adverse possession here state had received payment of pur-ase price long before claimant's entry, ate claimed no interest in land, and stat-ory and constitutional provisions that pro-eds for sale of land issued constitute a ust fund for colleges were not in any anner impinged by upholding claimant's le. Const. art. 10, §§ 3–7; art. 13, § 3; t. 20, § 1; U.C.A.1953, § 78–12–2.[1]

John S. Boyden, Allen H. Tibbals, Salt ke City, for appellants.

C. M. Gilmour, Clinton D. Vernon, Salt ke City, for respondent.

McDONOUGH, Chief Justice.

The first question here confronted, the swer to which we deem decisive of this peal, may be stated as follows: Where ids were granted to the state by the fed-l government for use of the State Agri-tural College and subject to the restric-n that all proceeds from the sale of said ds are to constitute a permanent fund be safely invested and held by the state, income thereof to be used exclusively the purposes of such college; and where tain of said lands were sold in the man-provided by law to a purchaser who reafter paid to the state the full pur-chase price thereof, and was therefore en-titled to a patent from the state, may a third party by holding the land adversely to the successors in interest of the purchaser for the requisite period subsequent to the date of final payment, but before issuance of patent, quiet title thereto as against such successors in interest of the purchaser?

The facts out of which this controversy arises are these: The state of Utah was granted by law the right to select certain federal lands as grants in aid of the Agri-cultural College and to sell the land so acquired. One Joseph Henshaw signed an agreement to purchase selected lands on the 24th of November, 1902. The lands he agreed to buy are the ones here in contro-versy. After approval by the United States Land Office the state on January 1, 1905, issued to Henshaw certificate of sale No. 8515.

Henshaw died in 1905 but prior to his death he had assigned and transferred the certificate of sale interest to one A. B. Lewis. In 1910, Lewis assigned and trans-ferred the certificate to Lewisiana Land Company, which company assigned and transferred the certificate on August 21, 1914, to William Story, Jr., and Frederick Steigmeyer, a co-partnership. Neither of these assignments were recorded in the Office of the County Recorder of Beaver County, where the land is located. Ap-pellants are the assignees and successors in interest of the co-partnership. On March 30, 1914, the state of Utah received the final payments constituting payment in full to the state of Utah of the sum due on the purchase of the land under the certificate of sale. No patent to said lands has ever been issued by the state of Utah.

One Gus S. Holmes, having acquired a money judgment in Salt Lake County against Lewis, procured to be issued a writ of execution on March 4, 1914. This, it will be noted, was several years after Lewis

Van Wagoner v. Whitmore, 58 Utah 118, 199 P. 670; Steele v. Bolvig, 61 Utah 447, 214 P. 847; Utah Gas & Coke Co. v. Eckman, 47 Utah 165, 152 P. 178; Livingston v.

of the other defendants is based on supplying Suhrmann with this prod- There may be a sharp conflict in the ence as to such facts.

] The order complained of was made notion of plaintiffs and opposed by the ndants who initiated the intermediate eal. Appellants contend (1) that such solidation is contrary to the Constitu- and statutory provisions of this State, (2) that it would be highly prejudicial defendants. We conclude that the trial rt's order was neither erroneous nor reach of its discretion.

Before considering defendants' claims call attention to Rule 42 of Utah Rules Civil Procedure. Subdivision (a) there- expressly authorizes the trial court to der a joint hearing of common questions law or fact arising from different ac- ons and to order such proceedings as ay tend to avoid unnecessary costs or lay. Subdivision (b) authorizes the trial urt in furtherance of convenience or to void prejudice to order a separate trial f any separate issue or any number of sues. So, unless the trial court's order is ontrary to the Constitution or statutes of is State, or is likely to be prejudicial o defendants, it was clearly within the dis- retion of the trial court to order a con- olidation for trial of the issue of lia- ility in all of these cases.

(1) This order does not violate any con- stitutional or statutory provision. To sup- port their contention contrary to this statement defendants rely on Article I, Section 7 of our Constitution that no "per- son shall be deprived of * * * property, without due process of law"; also Article I, Section 10, providing:

> "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict a verdict. A jury in civil cases be waived unless demanded."

From the details therein provided counsel concludes that the legislature has no power to change those provisions. We do not disagree with this conclusion but we find nothing in either Section 7 or 10 which is not in complete harmony with the trial court's order.

Counsel then refers to Section 78–21–1, U.C.A.1953, as follows:

> "In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered."

and Section 78–21–2, U.C.A.1953, as follows:

> "*All questions of fact,* where the trial is by jury, other than those mentioned in the next section, *are to be decided by the jury,* and all evidence thereon is to be addressed to them, except when otherwise provided." (Italics taken from appellants' brief.)

[2] Counsel claims that this statute, since it uses the term "the jury," means that one and the same jury must try all issues in the case. This is obviously a strained construction of that language. That language simply means that all questions of fact are to be decided by the jury impaneled to try such issues. It does not consider or determine the question of whether more than one jury may try different issues in a case. So, we conclude that neither the Constitution nor these statutes have any bearing on whether the same jury must decide all issues of fact in a given case.

(2) We are also unable to see that the consolidation of these cases for determination of liability only by one jury will be prejudicial to the defendants. Certainly a single determination of the question of liability will tend to save time and expense

...will be a sharp conflict in the evidence on the facts which will be determinative of liability.

Defendants' claim, that the consolidation of the cases to determine liability only will be prejudicial, is based on two propositions: (1) They claim that a jury which determines liability only without assessing specific amounts of damages is more apt to decide that question against them than would a jury charged with a determination of the amount of damages. (2) They claim that if the same jury determines liability and the amount of damages, the amount of damages would probably be greatly reduced.

We see no reason why a jury which determines only the question of liability would be more apt to determine that question against the defendants or either of them than would a jury which also determined the amount of damages. In fact, it is sometimes claimed that a showing that damages have been sustained appeals to the emotions of the jury and causes little or no consideration of the facts which create liability. In such case a jury which determines liability only would more carefully consider the facts on which such liability is claimed than would a jury charged with assessing the amount of damages also.

The claim that a jury which heard all the evidence on liability and damages would be likely to reduce the amount of damages is only well founded where a serious doubt of liability causes a compromise verdict on the amount of damages. Of course, the defendants are not entitled to the benefit of such a compromise verdict. They are only entitled to a separate fair consideration of the issues of fact which are determinative of the question of liability and the amount of damages. In either event I cannot see that either plaintiffs or defendants will be prejudiced by the order of consolidation made by the trial court.

Order of the trial court is affirmed. Costs to respondents.

McDONOUGH, C. J., and CROCKETT, WORTHEN, HENRIOD, Justice.

I concur, but make the following observation. The consolidation to determine liability which was ordered at pre-trial, so far as I can determine from the record was without any motion therefor having been made by any of the parties. The consolidation to determine liability no doubt was made to expedite matters and save expense. I am wondering if expedition and saving of expense would not be accomplished further if consolidation were ordered to determine not only liability but to determine damages, if liability were established. In such event, one jury could handle all matters and it would save a great deal of time and expense in impanelling eleven new and different juries.

MINERSVILLE LAND & LIVESTOCK COMPANY, Plaintiff and Respondent,

v.

Earl P. STATEN, Administrator of the Estate of William Story, Jr., deceased, et al., Defendants and Appellants.

No. 8662.

Supreme Court of Utah.

May 14, 1958.

Action to quiet title to land and for order directing state to issue patent to land. The Fifth Judicial District Court, Beaver County, Will L. Hoyt, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, McDonough, C. J., held that failure of purchaser of land which had been granted by federal government to state for use of agricultural college, and his successors in interest to demand issuance of patent or state's delay in issuing patent could not defeat plaintiff's title to land by adverse possession where state had received payment of purchase price long before